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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1841 :

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Equity, and Bankruptcy, Queen's Bench, Common Pleas,
Exchequer of Pleas,
Exchequer Chamber, and the Hall Court,**
And NOTES of JUDGMENTS in the House of Lords,

FROM
MICHAELMAS TERM, 1840, TO TRINITY TERM, 1841,
BOTH INCLUSIVE.

EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, ESQ.
BARRISTER-AT-LAW.

VOL. XIX.

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NAMES OF THE REPORTERS.

1841.

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BARRISTERS-AT-LAW.

Rolls Court,

PHILIP TWELLS, Esq. and FREDERICK JAMES HALL, Esq.
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Vice Chancellor's Court,

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JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM, 1840, TO TRINITY TERM, 1841, INCLUSIVE.

IN THE COURT OF CHANCERY.

The Right Hon. LORD COTTENHAM, Lord High Chancellor.
The Right Hon. LORD LANGDALE, Master of the Rolls.
The Right Hon. Sir LANCELOT SHADWELL, Knt., Vice Chancellor.

IN THE COURT OF REVIEW, IN BANKRUPTCY.

The Right Hon. THOMAS ERSKINE, Chief Judge.
The Hon. Sir JOHN CROSS, Knt.
The Hon. Sir GEORGE ROSE, Knt.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. THOMAS LORD DENMAN, Lord Chief Justice.
The Hon. Sir JOSEPH LITLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.
The Hon. Sir WILLIAM WIGHTMAN, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt., Chief Justice.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.
The Right Hon. THOMAS ERSKINE.
The Hon. Sir WILLIAM HENRY MAULE, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. LORD ABINGER, Lord Chief Baron.
The Right Hon. Sir JAMES PARKE, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir JOHN GURNEY, Knt.
The Hon. Sir ROBERT MOUNSEY ROLFE, Knt.

Sir JOHN CAMPBELL, Knt., Attorney General.
Sir THOMAS WILDE, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

IN the vacation after *Trinity Term*, 1840, WILLIAM GLOVER, Esq., of the Middle Temple, and STEPHEN GASELEE, Esq., of the Inner Temple, were called to the degree of the Coif, and gave rings, the former with the motto "*Regina et lege gaudet serviens*;" the latter with the motto "*Nec temere nec timide*."

On the last day of the Sittings in Banc after *Hilary Term*, 1841, Mr. Justice LITLEDALE retired from the bench of the Court of Queen's Bench, and WILLIAM WIGHTMAN, Esq., was appointed one of the Judges of that court. Her Majesty was soon after pleased to nominate Sir JOSEPH LITLEDALE a Privy Councillor, and to confer the honour of Knighthood upon Mr. Justice WIGHTMAN.

In the course of this year, Sir GEORGE ROSE, Knt., one of the Judges of the Court of Review, was appointed a Master in Chancery.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Chancery.

BY
PHILIP TWELLS, Esq., FREDERICK JAMES HALL, Esq., and
THOMAS HARE, Esq., BARRISTERS-AT-LAW.

4 & 5 VICTORIÆ.

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CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

MICHAELMAS TERM, 4 VICTORIÆ.

M.R. }
Nov. 2. } WILLATS v. BUSBY.

Practice. — Defendants out of Jurisdiction—Interrogatories.

Where some of the defendants were residing out of the jurisdiction, and had not appeared, nor been served with a subpoena, the Court allowed the plaintiff to exhibit interrogatories to prove that these defendants were out of the jurisdiction.

This suit was instituted to compel the specific performance of an agreement for the sale of an estate. It had been brought to a hearing, and had stood over, with liberty to the plaintiff to add parties. Three of the parties, who were now named as defendants, by amendment, resided out of the jurisdiction, one of them being in America, and two at Glasgow, and no subpoena had been served upon them. A motion was now made on behalf of the plaintiff, that he might be at liberty to exhibit before the examiner of the Court interrogatories, and examine witnesses, for the purpose of proving that these defendants were out of the jurisdiction; and that the plaintiff might be at liberty to examine

against these defendants the several witnesses who had been examined as against the defendants, as to whom these suits were before at issue, and such other witnesses as he should be advised.

Mr. Pemberton and Mr. James Russell appeared in support of the motion.

Mr. Bacon, contra, contended, that the plaintiff was not entitled to such an order until he had taken some steps to bring these three defendants before the Court. These parties were, perhaps, altogether ignorant of any of these proceedings; and the plaintiff was not entitled to proceed in this manner under such circumstances.

THE MASTER OF THE ROLLS.—These parties are out of the jurisdiction. It may be a great misfortune to the plaintiff, but he cannot compel them to put in their answers. How far the plaintiff will be able to avail himself of the proceedings at the hearing, is not now to be considered. But as to those defendants who are out of the jurisdiction, I see no reason why the plaintiff may not be permitted to prove the simple fact, that they are out of the jurisdiction.

M.R. }
Nov. 4. } *In re SHERWOOD.*

Solicitor—Trustee—Costs.

A solicitor, who acts as a trustee under a deed, will be entitled to his usual professional charges for services done by him as a solicitor, in the trusts created by the deed, provided a direction to that effect is inserted in the deed by which he is appointed trustee.

This was a petition which prayed that a solicitor's bill might be referred for taxation.

The petition set forth an assignment of a reversionary interest in some stock, to a trustee, who was a solicitor, upon certain trusts which it is not necessary to state; and a clause was inserted in the assignment, to authorize the trustee "to retain and receive by and out of the monies and premises which should come into his hands by virtue of the trusts thereby in him reposed, his usual professional costs and charges, which might arise or be incurred in carrying into execution the trusts of that assignment, or in prosecuting or defending any suit or suits, or otherwise, that might happen, as if he had not been the trustee of that assignment, but had been employed and retained by [the assignors] as their attorney or solicitor, in the matter of the trust thereby created."

The petition stated, that the trustee had retained sums out of the monies which he received as trustee, on account of charges for acts which he was bound to do as trustee, and for which he was not justified in making any charge as a solicitor; and prayed that these charges might be disallowed; and other charges were also complained of.

Mr. Younge appeared in support of the petition; and—

Mr. Randell opposed it.

Moore v. Fromd, 3 Myl. & Cr. 45; s. c.

7 Law J. Rep. (N.S.) Chanc. 113, was cited.

The MASTER OF THE ROLLS, in pronouncing judgment, stated, that it was not a matter of doubt, that when a solicitor happens to be a trustee, he is not entitled to charge in his character of trustee for services which he has rendered as a soli-

citor. But if a solicitor is appointed a trustee under a will, which directs that he shall be entitled to his usual professional charges, that direction will take the case out of the general rule. And if he is a trustee not under a will, but under a deed, and the deed explicitly directed that the solicitor should be entitled to charge for his own services as solicitor, although at the same time he was acting as a trustee—that as this was the contract entered into by the parties—the solicitor would then be entitled to his usual professional charges; and that this was clear from the observations of the Lord Chancellor, in *Moore v. Fromd*.

His Lordship dismissed the petition; but without costs.

L C. }
Nov. 4, 5. } SHUTTLEWORTH v. HOWARTH.

Practice.—Costs—Next-of-kin—Claimants not Parties to the Suit.

Persons establishing their claims, as being some of the next-of-kin or descendants of A. B, though not parties to the cause, are entitled to have the same costs as other successful claimants who are parties to the cause; but those costs do not include the costs of establishing their claims before the Master.

In this case Thomas Kay, by his will, dated the 28th of November 1822, gave certain real estates to trustees, upon trust, to sell the same, and to divide the produce of such sale and all his personal estate, amongst the descendants of his uncles and aunts (naming them), share and share alike, *per stirpes* and not *per capita*, to the fifth generation inclusive.

A bill was filed by two of the testator's trustees, who were also executors, against the testator's co-heirs-at-law and divers claimants under the will, for the purpose of having the will established, the estate of the testator administered, and the trusts of the will performed; and by the decree made in the cause on the 14th of August 1828, it was, amongst other things, ordered that the usual accounts should be taken, and that the Master should inquire, and state what descendants to the fifth generation inclusive of the testator's uncles and

aunts, mentioned in his will, were living at the time of his death; and if any of such descendants were or was since dead, who was or were his or their personal representative or representatives, and heir or heirs-at-law, or entitled to their shares in the said testator's estate; and it was, amongst other things, ordered, that the Master should tax the costs of the suit of all parties; and the consideration of the payment thereof, and of further directions and subsequent costs, was reserved. The Master, by his separate report, dated the 22nd of December 1835, certified that he had allowed the claims of several of the persons who had come before him, who were descendants in the first, second, third, fourth, and fifth generations of the testator's said uncles and aunts, and whose names and descriptions he had set forth in the schedule to his report. The persons whose claims had been allowed by the Master (exclusive of those claimants, who had also established their claims, and were defendants to the suit), were upwards of 450 in number, and they had incurred divers costs and expenses to a considerable amount, in making out and establishing before the Master their respective claims, pedigree, and descent. The Master, in March 1839, made his general report in the cause, embodying therein his separate report, which was afterwards confirmed; and the Court on the cause coming on, on further directions, on the 10th of August 1839, at which time the persons who had established their claims before the Master, but were not parties to the suit, were allowed to appear and be heard, declared, that the will of the said testator should be established, and the trusts thereof performed; and it was referred to the Master to tax *all parties* their costs of the suit not already taxed; but under the circumstances of the case, the Court did not think fit to give any of the persons who had established their claims before the Master, as descendants of the testator's uncles and aunts, and *not parties* to the said suit, *any costs* of establishing their claims; and after payment of the costs therein mentioned, the Master was directed to apportion the residue of the funds amongst the parties declared entitled thereto, whose claims had been certified

by the Master's report of the 22nd of December 1835; and the plaintiffs and defendants, and the parties then before the Court, were to be at liberty to apply as there should be occasion.

From the decree, on further directions, several of the claimants, not parties on the record, but whose claims had been established by the Court, presented a petition of appeal, praying that their costs, and the costs of all other persons, in making out their claims, who, not being parties to the suit, had established such claims as such descendants as aforesaid, might be ordered to be taxed, and paid, in like manner as the costs of the several persons parties to the said suit was, by the decree on further directions, directed to be paid.

Mr. Wigram and *Mr. Lloyd*, for the appellants, cited *Hutchinson v. Freeman*, MS., before his Lordship on the 29th of July 1839 (1), where the costs of establishing their claims were given to the claimants.

Mr. Spence, *Mr. Rogers*, *Mr. Geldart*, and *Mr. Cockerell*, appeared for other parties. *Waite v. Waite* (2) was cited by *Mr. Cockerell*.

Nov. 4.—The LORD CHANCELLOR intimated his opinion, that the different persons who were not parties to the suit, but had established their claims, were entitled to have their costs, in the same way and to the same extent as the claimants who were parties to the suit; but his Lordship said, he would look at his note of the case of *Hutchinson v. Freeman*, and give his decision on a future day.

Nov. 5.—The LORD CHANCELLOR stated, that he had made inquiry into the practice in cases of this description, and he found that the invariable practice was to allow the persons who had established their title, but who were not parties to the suit, the same costs as the claimants who were

(1) In *Hutchinson v. Freeman*, before the Lord Chancellor, the decree was drawn up, allowing the next-of-kin the costs of establishing their claim; but this was clearly an error, and not in accordance with the Lord Chancellor's judgment, the minutes whereof, as indorsed by counsel on their briefs, were expressly that the next-of-kin were not to have their costs of establishing their claims.

(2) 6 Madd. 110.

parties to the suit, and had established their title; but that such costs did not include the costs of making out their claims.

L.C.

Nov. 18, 19,
1839.

Nov. 7, 1840.

WARD v. PAINTER.

Insolvent Debtor—Assets.

A person who had taken the benefit of the Insolvent Debtors Act, died some years afterwards, leaving more assets than were required for the payment of all his debts contracted subsequently to his insolvency, which assets were alleged to be in danger of being wasted:—Held, upon demurrer, that the creditors of the insolvent antecedent to the insolvency, had such an interest in the assets which he acquired after his insolvency, as entitled them to the assistance of the Court to realize and protect such assets.

Whether the Court will ultimately administer the surplus of the property among the parties who were creditors anterior to the insolvency—quære.

A report of this case when it was heard by the Master of the Rolls, will be found in 8 *Law J. Rep.* (n.s.) Chanc. 295.

It was a creditors' suit, instituted by James Ward against the administratrix, with the will annexed, of Richard Willington Painter. The bill stated, that in May 1819, Painter took advantage of the acts then in force for the relief of insolvent debtors; that he had no estate either real or personal at the time of his discharge; that, after he had obtained his discharge, he engaged again in the business of a carpenter and builder; that Painter died in 1838, and by his will, bequeathed all his property to his wife, Mary Ann Painter, the defendant; that Painter never paid the debts which were owing by him at the time of his being discharged as before mentioned, and that after his widow had paid all his other debts, there remained a balance of his assets, of the amount of 3,000*l.*; that his widow was insolvent, and threatened to get in the estate of Painter, and apply it to her own use, and remove it beyond the seas, out of the jurisdiction of the Court.

The debt claimed by the plaintiff was 25*l.*

The bill prayed, that an account of Painter's estate might be taken, unless his administratrix would admit assets; and that his estate might be applied in payment, in the first place, of the debts (if any) contracted by Painter since his discharge, and owing by him at his death, which still remained unsatisfied; and, in the next place, of the debts owing by Painter at the time of his obtaining his discharge as aforesaid, with interest from the date of his executing the assignment to his assignees.

To this bill, the defendant put in a general demurrer for want of equity, which the Master of the Rolls overruled.

The defendant appealed from the decision of the Master of the Rolls; and—

Mr. Tinney, Mr. Wigram, and Mr. Teed, appeared for the appellants; and—

Mr. G. Richards and Mr. Rogers, contra.

In addition to the authorities referred to before the Master of the Rolls, the following cases were cited:—

Ex parte Fenwick, 2 Mont. & Ayr. 681; s. c. 5 *Law J. Rep.* (n.s.) Bankr. 46.

Browning v. Paris, 5 Mee. & Wels. 117; s. c. 8 *Law J. Rep.* (n.s.) Exch. 222.

Attorney General v. Aspinall, 2 Myl. & Cr. 613; s. c. 7 *Law J. Rep.* (n.s.) Chanc. 51.

Beckford v. Hood, 7 Term Rep. 620.

Nov. 7.—The LORD CHANCELLOR.—This, being a general demurrer, can only be supported on the ground that the plaintiff's bill shews, that he has no right to sue; and in this case, the bill being by a creditor against the representative of his debtor, that proposition can only be made out by shewing either that the plaintiff is not entitled to the character he claims of being a creditor; or, secondly, that this Court has no jurisdiction to give him any assistance.

The first point is not contended for. The bill alleges, and the demurrer admits, that the plaintiff was a creditor before the debtor took the benefit of the Insolvent Debtors Acts; and certainly the Insolvent Debtors Acts do not destroy the antecedent debt; and it did not require the

decision of *Jellis v. Mountford* (1), or the authority of *Ex parte Barrington* (2), to prove this. The title, therefore, of the plaintiff to the character of creditor of the deceased, cannot be disputed; and the only question that remains is, have the Insolvent Debtors Acts taken from the Court the right and jurisdiction to interfere in any manner for the relief or protection of such creditors? For this bill contains allegations calling for the interposition of the Court for the protection of the property, unless these acts have deprived it of its ordinary powers for that purpose; as it states that the defendant, the personal representative, is insolvent, and threatens to receive the property and apply it to her own use, and to remove it beyond the seas.

By the acts, the rights of the creditors of the insolvent, at the time of his taking the benefit of the acts, are postponed to the claims of creditors whose debts may have subsequently been incurred; but as to such subsequently incurred debts, there can be no doubt but that the jurisdiction of this Court remains unaffected by the acts. And if the creditors prior to the insolvency are interested in subsequently acquired property, but only after payment of the debts subsequently incurred, have they not a right to call upon the Court to administer the property so as to discharge the subsequently incurred debts, for the purpose of ascertaining and realizing the fund in which they are so interested? and are they not entitled to the aid of this Court to protect it against the danger which this bill alleges will happen? Whether this Court will ultimately administer the surplus of the property among the creditors anterior to the insolvency, is not a question now to be decided. The effect of the recognizances and other provisions of the acts may be very important to be considered, when the question shall arise; but for the present purpose it is sufficient to express my opinion, that the creditors antecedent to the insolvency have such an interest in the subsequently acquired assets of the testator, as entitles them to the assistance of this Court, for the pur-

pose at least of realizing and protecting the fund. The case of *Barton v. Tattersall* (3) is an answer to the argument on the Statute of Limitations. I, therefore, affirm the order of the Master of the Rolls, and dismiss the appeal, with costs.

M.R. }
Nov. 11. } WEEKS v. PITT.

Demurrer—Pleading—Multifariousness.

Upon the death of a lady in 1808, who was possessed of considerable real and personal estate, some litigation took place in the Ecclesiastical Court, respecting the validity of her will, which continued till 1812, when the will was established, and probate was granted to T. W., who became entitled, under her will, to the residus of her real and personal estate. While that litigation continued, the rents of the real estates and also the personal estate were received by the defendant, who had acted as the solicitor and agent of the testatrix, and had collected her rents during her life; and out of the monies received by him, he discharged her debts and funeral and testamentary expenses, but never accounted for the rents of the real estate, or for the personal estate received by him. The plaintiff was the personal representative both of T. W. and of the testatrix, and prayed by his bill, for an account of the rents of the real estate, and of the personal estate of the testatrix, received by the defendant since her death:—Held, on demurrer, that this bill was multifarious.

The bill stated, that Martha Trotman, at the time of making her will, and at her death, was seised of, or otherwise well entitled to, divers freehold and copyhold hereditaments; and that she was at the time of her decease possessed of considerable personal estate: that Joseph Pitt, the defendant, was her attorney and solicitor, and that he also for several years previous to her decease, acted as an agent for her, and received the rents of her estates: that Martha Trotman made her will, dated in February 1807, under which Thomas Weeks became entitled to all her residuary

(1) 4 B. & Ald. 256.

(2) 2 Mont. & Ayr. 255.

(3) 1 Russ. & Myl. 237.

real and personal estate: that Martha Trotman died in December 1808, and that the validity of her will being disputed, certain proceedings respecting it were prosecuted in the Prerogative Court of the Archbishop of Canterbury, during the year 1809, 1810, and 1811, but that probate of the said will was granted by the Prerogative Court in 1812, to Thomas Weeks: that during the interval of these years, Joseph Pitt received the rents and profits of the real estate of Martha Trotman, to a large amount, and also got in her personal estate to a large amount, and to an amount exceeding the sum of 16,000*l.*: that Pitt received the aforesaid rents and profits, and personal estate, as the attorney, solicitor, and agent of Martha Trotman; and subsequent to the decease of Martha Trotman, as an agent and trustee for and on behalf of the estate of Martha Trotman, and the persons interested therein, and that he paid her debts and funeral and testamentary expenses, and made some small presents to Thomas Weeks, on account of the monies so received by Pitt, as aforesaid, but that Pitt never came to an account with Thomas Weeks, or any person on his behalf, in respect of the said estates and effects of Martha Trotman, so received by him: that Pitt on various occasions acted as the banker of Thomas Weeks; and that various sums of money were received by Pitt, in the character of banker of Thomas Weeks, in respect of which sums Pitt had never come to any account: that in 1814, Thomas Weeks absconded, and either left the kingdom, or remained in concealment, and had never since been heard of by any of the members of his family, or by any of his friends: that he was of the age of fifty-five years, or thereabouts, when he absconded, and that it must be presumed that he had been long since dead, and that, in fact, he died several years ago; that the plaintiff in 1840 obtained letters of administration of the estate and effects of Thomas Weeks, and also of the estate and effects of Martha Trotman, left unadministered by Thomas Weeks; and that the plaintiff had thereby become and was now the sole legal personal representative both of Thomas Weeks and also of Martha Trotman: that Pitt had never come to any account with any pro-

per person in respect of his receipts and payments on account of the estate of Martha Trotman; and, that the plaintiff had applied to Pitt to account for his receipts and payments on account of the real and personal estates of Martha Trotman, and to discover the amount received and advanced by Pitt, in the character of banker, on account of Thomas Weeks.

The bill prayed an account of all sums of money received by, or come to the hands of Pitt or any person or persons by his order or for his use, or retained by him, for or on account of the rents, issues, and profits of the real estate of Martha Trotman, subsequent to her decease; and for an account of all the personal estate and effects of Martha Trotman, possessed or received by, or come to the hands of Pitt, or any person or persons, by his order, or for his use, and retained by him since her decease.

The defendant demurred to this bill for multifariousness.

Mr. Pemberton and *Mr. Parry*, in support of the demurrer.—The plaintiff claims the rents of the real estate, on the ground, that Thomas Weeks was devisee of them under Martha Trotman's will; and he claims the personal estate in a perfectly distinct character. Pitt received the personal estate, and thereout paid the testatrix's debts; and thus became executor *de son tort*. He was not an agent, but was acting in his own wrong.

Mr. Kindersley and *Mr. Renshaw*, for the plaintiff.—The only person who can require from the defendant an account either of these rents or of the personal estate of Mrs. Trotman, is the plaintiff; and where one party is entitled to call for an account of monies which another person has received, he may comprise these matters in the same bill, although the monies may have been received in respect of different things—*Campbell v. Mackay* (1).

Mr. Pemberton replied.

The MASTER OF THE ROLLS stated his opinion, that the bill was multifarious, and therefore allowed the demurrer.

(1) 1 Myl. & Cr. 603; s. c. 6 Law J. Rep. (n.s.) Chanc. 73.

M.R. }
Nov. 12. } BECKE v. WHITWORTH.

Practice.—Exceptions—Master's Report—12th Order of 1831, Construction of.

Under the 12th order of 1831, the Master may make several enlargements of the time for making his report upon exceptions, and it is not necessary for any of such enlargements, except the first, to be made within fourteen days from the date of the order of reference.

In this case the plaintiff had taken exceptions to the answer of one of the defendants for impertinence, which exceptions were referred to the Master by an order dated the 7th of July 1840. The fourteen days allowed by the 12th order of 1831 (1), for obtaining the Master's report on exceptions, expired on the 21st of July. On the 20th of July the Master certified, that a week's further time was necessary to enable him to make his report upon the exceptions. On the 27th of July, after the expiration of the fourteen days from the order of reference, the Master certified that a fortnight's further time was necessary to make his report. On the 8th of August the Master certified that he found the answer to be impertinent. A motion was now made on behalf of the defendant, that the Master's certificate of the 8th of August 1840, and also, if necessary, that the certificate of the 27th of July 1840, might be discharged and taken off the file.

Mr. Loftus Wigram, in support of the motion, contended, that under the 12th order of 1831, the Master, if he considered a further time was necessary to enable him to decide on exceptions to the answer, was bound to certify to that effect before the expiration of fourteen days from the date of the order, by which the excep-

(1) "That when any order is made for referring an answer for insufficiency, or for referring an answer or other pleading or matter depending before the Court for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining the order shall procure the Master's report within a fortnight from the date of such order, or unless the Master shall within the fortnight certify that a further time, to be stated in his certificate, is necessary, in order to enable him to make a satisfactory report; in which case the order shall be considered as abandoned, if the report be not obtained within the further time so stated."

tions were referred; and that after those fourteen days, the Master had no power to enlarge the time any more, even if he could make more than one enlargement at any time; that if any other construction was put on the order, the Master might postpone his certificate as to the exceptions, till an indefinite time; whereas it was clearly the object of the order, that the plaintiff might obtain a decision without any delay. He cited—

Smith v. Webster, 3 Myl. & Cr. 244.

Lloyd v. Wait, 4 Myl. & Cr. 257.

Mr. Pemberton and *Mr. Stinton*, contra, cited *Davis v. Franklin* (2), and also contended that the defendant, if he was dissatisfied, ought to have applied to the Court to get rid of the certificate of the 27th of July; and not to have waited till he knew the decision of the Master upon the exceptions, and then complained of the irregularity.

Milbanke v. Stevens, 8 Sim. 160; s. c.

7 Law J. Rep. (N.S.) Chanc. 107.

Burrell v. Nicholson, 6 Sim. 212.

Mr. L. Wigram replied.

The MASTER OF THE ROLLS said, that it did not appear from the circumstances which were stated to him, that the defendant had in any manner acquiesced in the right of the Master to make the second enlargement of the time for making his report on the exceptions, and therefore that he was not precluded from bringing the question before the Court; but his Lordship's opinion was opposed to the construction, which had been put by *Mr. Wigram* upon the 12th order, and he must therefore refuse the motion with costs.

L.C. }
Nov. 12. } WORMALD v. MACKINTOSH.

Evidence—Voir dire—Witness—Interest—Where no Disqualification of Witness.

M. mortgaged an estate to Messrs. T. & Co., who afterwards became bankrupts. Messrs. T. & Co., before their bankruptcy, gave a security to W. on the mortgaged estate to the amount of what was due to them from

(2) 9 Law J. Rep. (N.S.) Chanc. 139.

M. At a period subsequent to such transactions, M. executed a mortgage of the same estate to C. F., he being a creditor of M.'s to the amount of the mortgage money secured. At the time of the mortgage to C. F., S. P. joined with M. in a covenant for payment to C. F. of the mortgage money and interest, and also gave a guarantee for M. to C. F. for the payment; and the question was, what sum was due to W. in respect of the first mortgage.

*A bill having been filed by W. against M. for an account, the latter tendered S. P. as a witness, who proved the following statement, viz. "that one C. F. was a second mortgagee of the property mortgaged to the plaintiff for 1,000*l.*, and that he, S. P., had guaranteed that mortgage debt, and that if the estate was not sufficient, he should have to pay the debt; but that he had ascertained the estate was sufficient."*—Held, on appeal (reversing the decision of the Court below), that S. P. was a competent witness for the defendant M, and that the case was analogous to those in which it has been decided that legatees and creditors of a deceased party are competent witnesses in actions, by or against personal representatives to increase or protect the estate.

This was an appeal from a decision of the Master of the Rolls.

Mr. J. Wigram and Mr. Kenyon Parker appeared for the appellant:

Mr. Griffith Richards and Mr. Wright, for the respondent.

For the statement of the facts and decision in the Court below in this case, *vide* 9 *Law J. Rep.* (N.S.) Chanc. 7.

THE LORD CHANCELLOR.—It is necessary, in order to come to a right conclusion as to the admissibility of the evidence of Mr. Stafford Price, which was received by the Master, but on exception was rejected by the Master of the Rolls, very accurately to consider the matters in issue between the parties in the reference to the Master.

The defendant having mortgaged the property in question to Taylor & Co., in November 1825 they borrowed money of the plaintiff, on the security of their mortgage, and a deposit of the deeds. The original decree of 1829 declared the plain-

tiff was entitled to stand in the place of Taylor & Co., to the amount due to them at the time of such deposit, without prejudice to any question in respect of subsequent payments made by the plaintiff to Taylor & Company prior to the notice of the deposit. By an order of Sir John Leach, dated the 15th of June 1832, on exceptions to the Master's report, it was declared, the plaintiff was entitled to be considered as a creditor on the security of the property for 2,000*l.* and interest, unless it should appear by the general dealing between the defendant and Taylor & Co. since the death of the mortgagee, that any sum or balance was due to the defendant; and in that case it was declared, the defendant was entitled to set off such sum or balance against the said sum of 2,000*l.* and interest; and the Master was directed to take an account of all dealings and transactions between the defendant and Taylor & Co., and ascertain what, if any thing, was due to the defendant.

In pursuing this inquiry, a question arose as to whether the amount of a bill of exchange for 1,000*l.*, dated the 28th of September, and due the 27th of December 1825, and marked "Q," ought to be placed to the credit of the defendant and Taylor & Co. This bill was drawn by the defendant on Mr. Stafford Price, and discounted through Taylor & Co. The plaintiff insisted this was not a payment to Taylor & Co., for that they had themselves taken it up, but the defendant insisted it was, it having been taken up by Mr. Stafford Price as the acceptor; and upon an order of the 8th of March 1837, by which it was referred to the Master to inquire and state to the Court, by whom and in what manner this bill had been taken up, the defendant insisted before the Master, that the bill had been taken up by Stafford Price, the acceptor, through the medium of his bankers, and out of his money, and tendered Mr. Stafford Price as a witness to prove this statement, which was as follows, viz. that one Charles Finch was a second mortgagee of the same property for 1,000*l.*, and that he had guaranteed this mortgage debt, and that if the estate was not sufficient, he should have to pay the debt, but that he had ascertained the estate was sufficient.

The Master admitted this evidence; but on exception taken to the report, the Master of the Rolls was of opinion, that Mr. Stafford Price was not a competent witness, on the ground of interest, as the object of his evidence was to shew the first mortgage was to a certain extent satisfied, and thereby to improve the security of the second mortgage, which he had granted, and therefore to diminish the probability of being called upon to pay the amount. The question is, whether that be a correct application of the rule of law.

There can be no doubt such may be the effect of the evidence of this witness, but the subject-matter on which the witness is called upon to depose, is incidentally only connected with the interest of the witness. It does not touch the value of the mortgaged property, or the amount of the mortgage debt, but relates to other transactions quite unconnected with these matters, except that the Court has declared the defendant entitled to set off any balance arising from such transactions against the first mortgage debt, and the witness only being guarantee of the second mortgage, can only be affected by the amount of his claim as first mortgagee, in the event of the property not being sufficient to pay both, which he says he has ascertained it was.

The solution of this question must be looked for in the decisions at law, where questions upon the admissibility of evidence must be taken much more frequently to occur than in this court. Chief Baron Gilbert (1) says, "The law looks upon a witness as interested, when there is a certain benefit or advantage to the witness attending the consequence of the cause one way." This Tindal, C.J. observes, in *Doe d. Lord Teynham v. Tyler* (2), may arise, first, where the witness has a direct and immediate benefit from the result of the suit itself; and secondly, where he may avail himself of the benefit of the verdict, in support of his claim in a future action. The latter, which is the subject of the provision of the late statute, does not apply to this case. The distinction

between the direct and certain interest which disqualifies, and the remote and uncertain interest which does not disqualify, is strongly exemplified by the cases which have been cited,—that an inhabitant rated is not a competent witness to prove other lands within the district rateable, but that an inhabitant having property rateable not rated, is a competent witness for that purpose—*Morgan v. Pryor* (3).

The cases which apply most directly to the present, are those in which it has been decided that legatees and creditors of a person deceased, are competent witnesses in actions by or against representatives to increase or protect the estate, but that a residuary legatee is not competent—*Nowell v. Davies* (4), in which the other cases are referred to. The residuary legatee has a direct interest, for the fund is subject to charges upon it. The legatees and creditors are interested in the amount of the fund, in so far as their claims are to be paid out of it; but they have no interest in the amount, if it be sufficient to pay both such demands. Whatever may be the result of the issue on which they are examined, such interest is not so direct and certain as to disqualify them: but they have themselves claims on the fund, and the question is, the amount of the fund.

In this case, the question is the amount of the fund; and the witness has not even any claim upon it. His only interest is, that he is guarantee for the second charge upon it. If, therefore, the fund be sufficient to pay both charges, which the witness says he has ascertained it to be, he has no interest whatever; and if this statement is not to be attended to, his interest cannot be put higher than that of a legatee or creditor, in the case I have referred to.

I am therefore of opinion, the Master was right in receiving the evidence of the witness, and that the exceptions to the Master's report for having received it, must be overruled, and the order of the Master of the Rolls varied accordingly.

(3) 2 B. & C. 14; s. c. 1 Law J. Rep. K.B. 224.

(4) 5 B. & Ad. 368; s. c. 3 Nev. & Man. 745.

(1) Law of Evidence, p. 106.

(2) 6 Bing. 390; s. c. 8 Law J. Rep. C.P. 222.

NEW SERIES, X.—CHANC.

M.R. }
 Nov. 10, 16. } HALES v. DARELL.

Will—Annuity—Double Provision—Evidence.

*H, by deeds executed in his lifetime, granted an annuity of 300*l.* to each of his two sisters during their life, payable quarterly, in January, April, July, and October; one of these annuities was for his sister's separate use; and valuable consideration was given for both of them. H, by his will, gave an annuity of 900*l.* to one of his sisters, and of 500*l.* to the other sister, for their separate use, payable on the four usual quarterly days of payment. He also gave an annuity to his wife, which he expressly declared was to be in lieu of the annual sum to which she was entitled under her marriage settlement:—Held, that the testator's sisters were entitled to the annuities given to them respectively by the will, in addition to those which were given to them by the deeds.*

Whether, in such a case, parol evidence is admissible to explain the intention of the testator—quære.

By indentures of lease and release, dated the 29th and 30th of March 1814, the release being made between Sir Edward Hales, Bart., of the first part, Barbara de Jonchere, widow, (a sister of Sir Edward Hales,) of the second part, and John Raphael, of the third part; in consideration of 3,000*l.*, Sir Edward Hales conveyed certain hereditaments to Raphael, to the intent that Barbara de Jonchere might receive thereout an annuity of 300*l.* per annum, during her life, by equal quarterly payments, on the 16th of January, the 16th of April, the 16th of July, and the 16th of October, in every year, together with a proportionate part of the said yearly rent, up to the day of her decease, without any deduction; with powers of distress and entry in case of non-payment; and subject thereto, to the use of Raphael, upon certain trusts to secure the annuity; and Sir Edward Hales covenanted to pay the annuity.

By another indenture of the 13th of June 1814, and made between Sir Edward Hales, of the first part, Charles Bernard de Morlaincourt and Mary his wife, (another sister of Sir Edward Hales,) of the second part, Edward Darell, of the third part, and

John Hodges, of the fourth part; in consideration of the assignment and covenants thereafter contained, and in consideration of natural love and affection, Sir Edward Hales granted to Darell, during the life of Mary de Morlaincourt, in trust for her separate use, an annuity of 300*l.* per annum, by four equal quarterly payments, on the 6th of April, the 6th of July, the 11th of October, and the 6th of January, in each year; and after her decease, he granted an annuity of 150*l.* to Charles Bernard de Morlaincourt during his life; with powers of distress and entry, in case of non-payment; and by the same indenture, Sir Edward Hales conveyed certain hereditaments to a trustee to secure these annuities; and also covenanted to pay them, and to convey certain estates to their issue. And Charles Bernard de Morlaincourt and his wife assigned to Sir Edward Hales all their claims to certain monies charged on the estates of Sir Edward Hales, in favour of Mary de Morlaincourt; and C. B. de Morlaincourt also covenanted for the execution of similar assignments by their children.

Sir Edward Hales, by his will, dated the 2nd of May 1826, devised his freehold estates to trustees, to the intent that his wife might receive during her life, *in lieu of any annual sum payable to her under her marriage settlement, and of her dower*, an annual sum of 1,500*l.* And he then created a trust for payment of his debts, and devised his estates to trustees, upon trust, to pay an annuity of 900*l.* unto his sister Barbara de Jonchere, for her life, and to pay an annuity of 500*l.* to his sister Mary de Morlaincourt, for her life, and to pay other annuities. And he directed, that each of the annuities given by his will should be paid by four equal quarterly payments, on the four most usual days of payment in the year; the first of such payments to be made on such of the said quarterly days of payment as should first happen after his decease; and he also directed that the said yearly sums limited to Lady Hales, Barbara de Jonchere, and Mary de Morlaincourt, should be paid to them respectively for *their separate use*.

Sir Edward Hales died in March 1829.

The question which was now brought before the Court, was, whether the testator's sisters were entitled to the annuities

given to them by the will *in addition* to the annuities, to which they became entitled under the deeds of 1814.

The manner in which it came before the Court, will appear from the judgment of the Master of the Rolls.

The Master had admitted the evidence of Lady Hales, and of the gentleman who prepared the will. This evidence was given with a view of shewing that it was the intention of the testator, that his sisters should have both the annuities; and the Master decided in favour of the sisters' claim.

The infant plaintiff presented one petition, which is stated in the judgment; and another petition was presented by Lady Hales, praying that the arrears due to her in respect of her annuity, might be raised by mortgage, and paid to her.

Mr. Stuart, Mr. Turner, and Mr. Calvert, appeared for the infant plaintiff; and *Mr. Kindersley, Mr. White, and Mr. G. Richards*, contra.

Mr. Pemberton appeared for other parties.

The following authorities were cited on the question of satisfaction:—

- Fowler v. Fowler*, 3 P. Wms. 353.
- Garthshore v. Chalie*, 10 Ves. 1.
- Wathen v. Smith*, 4 Mad. 325.
- Graham v. Graham*, 1 Ves. sen. 262.
- Barrat v. Beckford*, *ibid.* 519.
- Lee v. Cox*, 3 Atk. 419.
- Rickman v. Morgan*, 2 Bro. C.C. 394.
- Jesson v. Jesson*, 2 Vern. 255.
- Goodfellow v. Burchett*, *ibid.* 298.
- Blois v. Blois*, 2 Vent. 347.
- Jeacock v. Falkner*, 1 Bro. C.C. 295.
- Goldsmid v. Goldsmid*, 1 Swanst. 219.
- Devese v. Pontet*, 1 Cox, 188.
- Blandy v. Widmore*, 1 P. Wms. 324.
- Pierpoint v. Lord Cheney*, *ibid.* 488.
- Adams v. Lavender*, 1 M'Cl. & Y. 41.
- Kirk v. Webb*, Prec. in Chanc. 84.
- Roper on Legacies*, ch. 17.
- Mathews v. Mathews*, 2 Ves. sen. 635.

The following cases were cited on the question as to the admissibility of parol evidence:—

- The King v. the Inhabitants of Wrangle*, 2 Ad. & El. 514; s. c. 4 Law J. Rep. (N.S.) M.C. 43.
- Smith v. Young*, 1 Campb. 439.
- Vincent v. Cole*, Moo. & Mal. 257.

Hurst v. Beach, 5 Mad. 351.

Weall v. Rice, 2 Russ. & Myl. 251; s. c. 9 Law J. Rep. Chanc. 116.

Wallace v. Pomfret, 11 Ves. 542.

Phillipps on Evidence, 1, 488.

Nov. 16.—THE MASTER OF THE ROLLS.
—In this case, Sir Edward Hales, the testator in the cause, granted annuities of 300*l.* each to his two sisters, Madame de Jonchere and Madame de Morlaincourt, for their respective lives; and afterwards, by his will, he gave to his sister Madame de Jonchere an annuity of 900*l.* for her life, and to his sister Madame de Morlaincourt an annuity of 500*l.* for her life. By his will, he also gave an annuity of 1,500*l.* a year to his wife for her life; and in the progress of the cause it having become desirable to ascertain, whether the annuity to the widow could be safely paid, it was referred to the Master to inquire whether there were any and what charges on the estates devised by the will, prior to the widow's annuity; and some further inquiries being authorized by a subsequent order, the Master reported that the charges affecting the devised estate, prior to the widow's annuity, were (amongst others) the annuities of 300*l.* each, granted to the testator's two sisters. The confirmation of this report was opposed by the infant plaintiff, who presented a petition, praying for a declaration, that the annuities of 900*l.* and 500*l.* given to the sisters by the testator's will, were given in satisfaction of the annuity of 300*l.* each, which he had secured to them in his lifetime. And it being alleged that the circumstances had not been fully investigated, it was referred back to the Master to inquire further as to all the annuities, and to state his opinion thereon to the Court. Under this order he has made the inquiry directed, and has certified his opinion, that the two annuities of 300*l.* each continued to be subsisting charges on the estate of the testator, which was subjected to the payment thereof, notwithstanding the bequest of the annuities given by the will. In conducting the inquiry, the Master received parol evidence of declarations made by the testator, which were tendered in evidence for the purpose of shewing he intended the annuities given by his will to be in

addition to the annuities previously granted. And the petition now presented on behalf of the plaintiff objects to the reception of such parts of the evidence which the Master so admitted; and objects to the conclusion to which the Master has arrived. The consideration of the parol evidence objected to, is not material, if a just conclusion can be arrived at, on the grants of annuity and the will alone, or the grants of annuity and the will together with the evidence which is *not* objected to. [His Lordship stated the deeds of the 29th and 30th of March 1814, and 13th of June 1814.]

In the argument it was urged for the plaintiff, that these deeds ought to be considered only as covenants, which, at least as to payments to be made after the testator's death, were merely executory. I need scarcely observe, the deeds, though containing covenants, are not of the character thus imputed to them. All that could be done by the testator for securing future payment, was done.

The testator being under the obligation thus imposed on him, and his estates being thus charged by the deeds, executed as they were for valuable consideration, made his will, dated the 2nd of May 1826.—[His Lordship stated the effect of the will.]

For the plaintiffs, it was argued, that the covenants in the deed, being executory, have been performed, or more than performed, by the bequest in the will. A covenant to grant or secure an annuity, may be performed by provisions purporting to be a gift in the will; but having regard to the contents of the deeds by which the annuities were granted, I am of opinion, the question here is not whether the covenants, into which the testator had entered, have been performed by his will; but whether the obligation into which he had entered, and the charges to which he had subjected his estates, were intended to be, and ought to be deemed, satisfied by the provisions in his will. The question, therefore, appears to me to be a question of satisfaction; and though there are unfortunately inconsistent authorities, which seem applicable to cases of this nature, it sufficiently appears that a testator may be deemed to have intended a bounty; and a gift, even more than equivalent, of beneficial interest, to satisfy

the obligation, is not to be deemed satisfaction, if there are circumstances which lead to a different conclusion. Now, here, the testator has directed the payment of all his debts, and among his debts are the annuities secured by the deeds. In his will, intending the annuity given to his wife to be in lieu of the annual payment to which she might be entitled, he has expressly said so. But he has used no such expressions with reference to either of the annuities secured to his sisters. Again, the annuities secured by the deeds appear by the Master's report to be the first charges on the estate comprised in the deeds; the annuities given by the will are subject to prior charges on the testator's estate. The times of payment are not the same, and the charges are of a different nature; and under these circumstances it appears to me, that, independent of any parol evidence, the annuities given by the will cannot be taken as a satisfaction for the annuities secured by the deeds. Much greater doubt than there is in this case would, I think, be removed by the evidence which has not been objected to.

Having formed my opinion on the instruments themselves, it is unnecessary to consider the question raised, as to the admissibility and effect of the parol evidence. The petition of the plaintiff must, therefore, be dismissed. On the other petition, the Master's report must be confirmed; and he must be directed to inquire what is due in respect of all the annuities, and to state the amount thereof in his general report.

L. C. } *Lancaster Bilton 4d & 3. Ch 547.*
May 1; } HEIGHINGTON v. GRANT.
Nov. 18. } *Spencer Will 50 & 56 & 67*

Accounts—Annual Rests—Compound Interest—Form of Decree charging a Party with Compound Interest.

By decree, it was directed, that the Master should ascertain what balances the defendant had in his hands, unapplied, at the end of twelve months from the testator's death, and also "what balances at the end of each year, since that time; and it was ordered, that the Master should compute interest at the rate of 5l. per cent. per annum, on the balances in the defendant's hands, at the end

of each year, and the Master, in taking the accounts, was to make annual rests, and to charge the defendant with interest, after the rate and in manner aforesaid."—*Held, that the Master ought to have charged the defendant with compound interest.*

For the facts of this case, and the judgment of the Master of the Rolls, vide 9 *Law J. Rep.* (N.S.) Chanc. 142.

Mr. Griffith Richards and *Mr. Keene*, in support of the appeal from the judgment of the Master of the Rolls, deciding that the defendant ought not to be charged with compound interest, cited—

Raphael v. Boehm, 11 Ves. 92.

Cotham v. West, M.R., 15th of November 1836, (not reported).

Mr. Wigram and *Mr. Lloyd*, for the respondent, cited—

Tebbs v. Carpenter, 1 Madd. 290.

Binnington v. Harwood, Turn. & Russ. 477.

THE LORD CHANCELLOR.—This question turns entirely on the construction of the decree. The terms used have obtained a judicial construction, and if that be consistent with the natural construction, the difficulty is removed. The decree, in the first place, directs the Master to inquire into and ascertain the balance; secondly, "to compute interest at the rate of 5*l.* per cent. per annum on the balances which should appear to have been in the hands of the defendant at the end of each year since the time aforesaid; thirdly, the Master, in taking the said accounts, is to make annual rests; and fourthly, it is ordered, that the defendant should be charged with interest after the rate and in manner aforesaid, upon such balance accordingly." The Master's report has ascertained the balances due from the defendant at the end of each succeeding year, and charges him with the aggregate of all such sums, and with interest thereon, but does not add the interest due at the end of each year, to the balance of principal then due, and charge the defendant with interest on such principal and interest added together at the end of each succeeding year. In the manner in which the Master has taken the accounts, he has obeyed the first and second

directions of the decree; and if the decree had stopped there, the Master would have been right. But what construction is to be put on the two last directions in the decree, viz. that "the Master is to make annual rests, and the defendant is to be charged with interest after the rate and in manner aforesaid"? The direction to make annual rests follows the ascertaining of the balance each year, and computing the principal and interest in each year, and "in taking the said account, he is to make annual rests." It cannot be said, that the interest to be charged is not part of the accounts to be taken against the defendant. The fourth direction is, that the defendant "is to be charged with interest after the rate and in the manner aforesaid." If the Master had done before all that was required of him, the fourth direction would be useless. The rate is ascertained, but what is the meaning of "manner aforesaid" if by the term "annual rest," it is not intended to add interest to principal money? The fact is, that in order to make the matter clear, the fourth direction is added. If I had to give a construction to this decree unaided by judicial decisions, I should have had no difficulty. But in *Raphael v. Boehm*, Lord Eldon, after consideration, and careful inquiry in the Master's office as to the practice in such cases, decided that the proper proceeding was to ascertain the balances, then the interest, and to add the interest to the principal, at the end of each year. Lord Eldon, in that case, as well from the natural meaning of the terms used, as from what he found to be the understanding of them in the Master's office, came to the conclusion, that the Master had taken the right course. But it is supposed that subsequent cases have varied the decision in *Raphael v. Boehm*. Those cases, however, when considered, will not be found parallel with the present. In *Binnington v. Harwood*, the decree only directed annual rests, and contained nothing in it whatever, relative to charging the defendant with interest on balances, as in the fourth direction in this case. In *Wilson v. Metcalfe* (1), the decree was not, as in the present case, to compute interest on the balances in hand; and in *Tebbs v.*

(1) 1 Russ. 530.

Carpenter, interest on balances was directed to be calculated, but there was no direction to make annual rests. In *Cotham v. West*, the direction was to make annual rests, and to compute interest on the balances, at the rate of 5l. per cent. per annum, and the direction there was more specific than in the case before me. One way of trying the question would be, to suppose a contract made in the terms employed in this decree, between a merchant and his correspondent—could there be any question as to the meaning to be put upon it? It must be referred back to the Master to review his report.

V.C. }
Nov. 16. } BRIDGES v. BRANFILL.

Practice.—Enlarging Publication—Service of Notice of Application.

On an application by one of several defendants to enlarge publication, the other defendants must be served with notice.

The time for passing publication had elapsed, but pending a motion on behalf of some of the defendants to enlarge publication, the plaintiff had undertaken not to proceed. It was now moved that publication might be enlarged.

Mr. Bethell, for the plaintiff, objected that the other defendants ought to be served with notice of the motion.

Mr. K. Bruce, for the motion, cited *Smith's Practice*, vol. 1, p. 388, 2nd ed. (1).

The Attorney General v. Nethercoat (2).

The VICE CHANCELLOR said, that it appeared to him, the other defendants, who might be delayed by the proceeding, had such an interest as required that they should be served with notice of the application.

(1) Where, treating of the practice before the Master, to whom the application is made, unless it is necessarily special, it is said, that "if one of two or more defendants applies, he is only bound to serve the plaintiff with the warrant, and need not serve his co-defendants."

(2) Not reported on this point.

V.C. }
Nov. 23, 25. } BROWN v. DOUGLAS.

Creditors' Suit—Partnership Debt—Administration of Estates of deceased Partners—Priorities of joint and separate Creditors—Parties—Multifariousness—Demurrer ore tenus—Costs.

The joint creditors of a partnership are not entitled to have the separate estate of a deceased partner applied in payment of their joint debts, until the separate creditors of such deceased partners are paid.

A joint creditor of a partnership is entitled to a decree in one suit, on behalf of himself and all other creditors, against the representatives of several deceased partners and the surviving partners, for the administration of estates of all the deceased partners.

The objection that the defendants, who are alleged to have possessed the personal estate without proving the will, are not answerable to the creditors, but are only answerable to the personal representatives; and that no such personal representatives are parties, is an objection for defect of parties, and not an objection for want of equity.

The causes of demurrer assigned on the record being disallowed, but causes assigned ore tenus being allowed, the demurrer was allowed without costs.

The bill was filed by J. Brown, one of the public officers of the bank of Manchester, on behalf of that company, and all other the creditors of J. Douglas, deceased, and J. Sedgwick, also deceased, who should come in and contribute to the expenses of the suit against the persons named as executors in the will of Sedgwick, the executors and devisees under the will of Douglas, and the assignees of the surviving partners, who were bankrupts.

The bill stated, that in 1839, Douglas and Sedgwick, together with E. Weatherby and other persons, named Addison, Ford, Gibson, and Hilton, carried on business as cotton-spinners, in co-partnership together at Holywell, and also carried on the business of bankers at the same place, in co-partnership, under the firm of Douglas, Smalley, & Co.; that Douglas and Weatherby also carried on business as cotton-spinners at Rendleton, in co-partnership, under the firm of William Douglas & Co.;

that Sedgwick died on the 3rd of October 1839, and Douglas died the 21st of the same month; that at the time Sedgwick and Douglas died, the firm of Douglas, Smalley, & Co. was indebted to the Manchester bank to the amount of upwards of 16,000*l.*, and the firm of William Douglas & Co. was indebted to the same bank upwards of 4,000*l.*; that new accounts were opened by the bank with the surviving partners, the result of which was to reduce, in a slight degree, the former balances, when, in April 1840, Weatherby, Ford, Hilton, Addison, and Gibson, became bankrupts; that the Manchester bank had proved under the fiat for the balance due to them from Douglas, Smalley, & Co., but had not proved against the separate estate of Weatherby, for the sum due to them from William Douglas & Co.; that after the whole of the joint estate of the bankrupts should have been distributed under the fiat, and after the separate estate of Weatherby should be administered, a considerable part of the partnership debts would remain unpaid; that Sedgwick made his will, and appointed J. Stanton his executor; that the will had not, however, been proved, but Stanton had possessed himself of the personal estate; that Douglas died seised of considerable real estate, and possessed of divers leaseholds and other personal estate, having made his will, and thereby, after giving to his wife an annuity of 500*l.* for her life, and to each of his five daughters 2,000*l.*, and other legacies, charged on his real estate, and directing that his widow should be allowed to remain in his mansion-house at Gyrn, he devised his real estate to his son, his heirs and assigns, and appointed Weatherby, his widow, and his son, and another person, executors; but that the executors had not proved his will, although they had taken upon themselves the execution thereof, and possessed his personal estate, and were proceeding to convert it into money; and that his son was in possession of the real estate.

The bill prayed, that it might be declared that the estates of Sedgwick and Douglas respectively were liable in equity to the payment of so much of their late partnership debts as were owing at the time of their respective deaths, and still

remained unpaid, and that an account might be taken of the personal estate of Sedgwick possessed by Stanton, and a like account of the personal estate of Douglas possessed by his executors, and an account of his real estate, and the rents and profits thereof received by his son and devisee, and that such real estate might be sold, if necessary, in aid of the personal estate, and that the executors of Douglas might be restrained by injunction from intermeddling with his personal estate; and that a receiver might be appointed of his real and personal estate, and also of the personal estate of Sedgwick, and that the personal estate when got in, and the produce of the real estate, so far as the same might be necessary or would extend, might be applied in payment of the funeral and testamentary expenses of the said testators respectively, and their debts, as well joint as separate, in a due course of administration.

To this bill the widow and son of Douglas, who were devisees under his will, and were also named as executors, demurred for want of equity and multifariousness. The want of personal representatives of the testators, was also assigned *ore tenus*, as a third ground of demurrer.

Mr. Jacob and *Mr. J. Russell*, for the demurrer.—Two estates cannot be administered in the same creditors' suit; or, if that could be done, it might be extended to an indefinite number, as, for example, to all the deceased members of a joint-stock company, and the final decree postponed until every question, which might arise in those cases which presented the most complicated questions, had been settled. But if a partnership creditor might sustain such a suit against the estates of deceased partners, yet this suit goes beyond the principle or necessity of the rule, for it is a suit not merely by partnership creditors of both, but in behalf of all the creditors of each. It is as erroneous to sue in classes who ought not to be so united, as it would be if the individuals were named; it is no other than this case—A is indebted to B, and C is indebted to D. A and C die, and B and D are joined as plaintiffs in a suit against the representatives of A and C to administer

both estates and obtain payment of the several debts. There is no equity, moreover, as against these defendants; they are not representatives, for they have not proved the will. They are not in the situation of an executor *de son tort*, or if they were, yet an executor *de son tort* cannot be sued by a creditor; he is merely a debtor to the estate, and may be made to account to the personal representative properly constituted, but not to a stranger, and not in a suit in which no personal representative is made a party.

Turner v. Robinson, 1 Sim. & Stu. 313; s. c. as *Turner v. Doubleday*, 6 Madd. 94.

Marcos v. Pebrer, 2 Sim. 330, n.

Simons v. Milman, *ibid.* 241; s. c. 6 Law J. Rep. Chanc. 148.

Mr. Knight Bruce and *Mr. Teed*, for the bill.—It would be impossible to have the relief which is sought—the payment of the partnership debt—without first having the account of the separate debts taken, and their payment provided for. The plaintiff is entitled to stand as a joint creditor, and also as a separate creditor; but as a separate creditor he is postponed.

Winter v. Innes, 4 Myl. & Cr. 101, 109.

Stephenson v. Chiswell, 3 Ves. 566.

Gray v. Chiswell, 9 Ves. 118.

Wilkinson v. Henderson, 1 Myl. & K. 582; s. c. 2 Law J. Rep. (n.s.) Ch. 191.

Campbell v. Mackay, 1 Myl. & Cr. 604; s. c. 6 Law J. Rep. (n.s.) Chanc. 73.

The objection taken from the fact, that the defendants have not proved the will, is not an objection to the equity, and it does not therefore fall within the assigned ground of demurrer; it must be taken to be a ground assigned *ore tenus*, and, if allowed, must be at the costs of the demurring party—*Mortimer v. Fraser* (1).

Nov. 25.—The VICE CHANCELLOR—(after stating the facts of the case as they appear on the bill).—The parties who demur are two persons who are named as executors in the will of Douglas, and are also parties interested in his real estates. The causes of demurrer assigned on the record are the want of equity generally, and that the bill is multifarious. It appears

to me, that in these respects the bill is rightly framed. The principle upon which the estate of a deceased partner must be administered, has been settled in the case of *Gray v. Chiswell*, in which it was decided, that after the joint estate of the partnership has been applied towards the payment of the joint debts, the surplus of the separate estate of every partner, after payment of their separate creditors, must contribute to supply the deficiency of the joint estate. In principle, the very point now in question was decided in the case of *Wilkinson v. Henderson*. There Shepherd and Hartley were partners; Shepherd died, and the bill was filed against his representatives and the surviving partner. The suit thus constituted, Sir J. Leach held to have been properly framed; and that appears to me to be an express decision on this point. And in this case, the plaintiff, being in a situation which entitles him to proceed against the joint estate of the partnership, is also entitled to a more ample relief than would be obtained in a suit merely against the separate estate of either of the parties.

The cause of demurrer, which has been assigned *ore tenus* to this bill, must however be allowed. It is plain the suit is defectively constituted, and that it cannot proceed without having representatives of both Sedgwick and Douglas before the Court. The allegation, that the will of Douglas has not been proved, does not exclude the fact that there may be an existing personal representative; for there might have been an administration *cum testamento annexo*. I do not think that any general rule can be extracted, with respect to the costs, from the decision of the Lord Chancellor, in the case of *Mortimer v. Fraser*, or that any such general rule was intended to be laid down in that case. The present bill is manifestly and palpably defective as to parties; and that objection being now taken, although not assigned on the record, the demurrer must be allowed on that ground, but without costs. I think it right, however, that the plaintiff should have liberty to amend the bill generally; for it is obvious, that the mere introduction of other parties would not be sufficient.

Order accordingly.

(1) 2 Myl. & Cr. 173.

M.R.
 July 6, 19, }
 1839. PRITCHARD v. FOULKES.
 L.C. PRITCHARD v. GLADSTONE.
 Nov. 7, 1840.

Practice.—Interrogatories—Depositions.

After a suit had abated, and had been duly revived, an order was obtained on petition, for a commission to examine witnesses. The petition and the order were intituled both in the original and the revived suit. A witness was examined on behalf of one of the defendants, on interrogatories intituled in the original suit only:—Held, that these interrogatories were not regularly intituled, and the depositions were ordered to be suppressed.

Held also, that an irregularity of a defendant in examining witnesses after the day for publication had passed, was cured by a subsequent order, made by consent, for enlarging publication.

This was a motion by way of appeal from an order made by the Master of the Rolls, whereby the depositions of certain witnesses examined on behalf of the defendant Foulkes, in the first cause, were ordered to be suppressed.

In December 1837, a commission to examine witnesses was issued by the plaintiffs in the first cause, but it was never executed, on account of a treaty of compromise being subsequently entered into. During such treaty, one of the defendants died, and in March 1838, a bill of revivor was filed against her personal representatives, and an order to revive the suit was duly obtained and served. After the suit had been revived, a compromise of the matters in dispute was again attempted, and it was then arranged between the parties, that a decree should be taken on minutes, to be previously agreed upon, and that publication should pass; and accordingly publication was, with the consent of all parties, passed on the 26th of June 1838, and the cause was set down for hearing, but, the parties afterwards disagreeing, the cause was not heard. The plaintiffs on the 19th of July 1838, presented a petition for a commission in the original and revived suits, and the clerks in court for the defendants signed their *consent* in the origi-

nal petition, but the petition did not seek a renewed commission, or that publication should stand enlarged until the return thereof. An order was made by the Court, upon which the plaintiffs sued out a commission in the *two suits*, dated the 16th of August 1838, which was returnable on the 19th of November 1838. All the defendants, except those to the revived suit, joined in the commission, but the only defendant who examined witnesses, was the defendant Foulkes, and the interrogatories exhibited by him were entitled in the abated suit only, and the depositions were entitled in the same manner. In the title to the interrogatories and depositions, the late defendant was not described as deceased, but was stated to be then a defendant to the suit. The witnesses on behalf of the defendant Foulkes were examined on the 23rd of November 1838, being four days after publication had passed. An order to enlarge publication on the plaintiff's application, until the first day of Hilary term, 1839, was afterwards made by the Master, with the consent of all parties, but the order did not state from what time publication was to be enlarged. For the defendant Foulkes, it was contended, that by such last-mentioned order, the error which he had made by examining witnesses after publication had passed, would be corrected, and that an abatement as to one defendant was not an abatement as to other defendants, one defendant being to be considered an entire stranger to his co-defendants. On the other hand it was insisted, that, by that order, publication would be considered to be enlarged, not from the time at which publication previously passed, but from the date of the order enlarging publication, which was dated the 26th of November 1838. The objection was also insisted on for the plaintiffs, that the depositions ought to have been taken, and the interrogatories entitled in both causes.

A motion was made before the Master of the Rolls, in July 1839, that these depositions should be suppressed.

The MASTER OF THE ROLLS held, that the plaintiffs had waived the objections as to the examination of witnesses on the part of the defendant Foulkes, after pub-

lication had passed, by the subsequent enlargement of publication by consent, but that the interrogatories, after the consent of the defendant to the order of the 19th of July, and the issuing of the commission in both causes, were improperly entitled, and therefore bad.

Mr. Cooper and *Mr. Bacon* appeared in support of the motion before the Lord Chancellor.

Mr. Wigram and *Mr. J. Russell*, contra. The following cases were referred to:—

Curre v. Bowyer, 3 Swanst. 357.

Perry v. Silvester, Jac. 83.

Campbell v. Dickens, 3 You. & Col. 720; s. c. 9 Law J. Rep. (N.S.) Ex. Eq. 33.

November 7.—The LORD CHANCELLOR said, that the commissioners were authorized to examine witnesses in a cause consisting of two bills, the original and the revived bill; that this authority had not been followed: and his Lordship agreed with the Master of the Rolls in thinking that the depositions had been irregularly taken, and that they ought to be suppressed.

V.C. }
Nov. 12. } SKIRNE v. POWELL.

Practice.—Bill to perpetuate Testimony—Want of Prosecution—Costs.

A bill to perpetuate testimony is not dismissed for want of prosecution, but the plaintiff is ordered to proceed forthwith, and complete his examination, or pay the defendant his costs.

The bill was for the purpose of perpetuating the testimony of witnesses, and was filed on the 11th of February 1836. The answer was put in on the 24th of May 1836. The bill was amended on the 26th of March 1838, and an answer to the amended bill put in on the 25th of June 1838. The plaintiffs filed a replication, and served a subpoena to rejoin on the 8th of January 1839. No other step had been taken. It was now moved, on behalf of the defendant, that the plaintiffs might be ordered forthwith to proceed with the exa-

mination of their witnesses, as prayed by their bill, and procure such examination to be completed on or before the last day of the next Michaelmas term, or, in default thereof, that the plaintiffs might be ordered to pay to the defendant his costs of this suit, including the costs of this application, to be taxed, &c.

Mr. Lewis, for the motion, cited *Barham v. Longman* (1).

Mr. Rogers, for the plaintiffs.

The VICE CHANCELLOR made the order.

L.C. }
Nov. 13, 17. } COTMAN v. ORTON.

Vendor and Purchaser—Lien—Principal and Agent—General, Special, and Particular Authority—Costs.

A contract in writing was made between A on behalf of B, for the sale of lands to C, and the payment of the purchase-money was to be made at a future day. Before that day arrived, A, the solicitor and general agent of B, applied to C for payment of part of the purchase-money to him, which application C complied with; afterwards C entered into a sub-contract for sale of the purchased lands to W, and sought to have paid him by W, that part of the purchase-money which he had already paid to B's agent and solicitor in the transaction:—Held, that the general agency of A, on behalf of B, did not justify the payment to him by C of part of the purchase-money agreed to be paid originally by C, and that C had no claim against W, nor any lien on the lands sold, for the amount paid by him to the agent of B on the original purchase. The distinction between a particular and general authority explained.

In this case Snelson, as the solicitor and agent of William Orton, on the 14th of November 1832, caused certain copyhold lands belonging to the latter, to be put up to public auction, but, the same not being sold, an agreement in writing was entered into and signed by Mark Snelson and the plaintiff, which was as follows:—
"It is agreed, this 15th of November 1832,

(1) 2 Sim. 460, n.

between Mark Snelson, and the Rev. Joseph Cotman, that the said Snelson shall sell on the part of Mr. W. Orton, the owner of the lands mentioned in the within particulars, the said lands, with the timber thereon, at the price of 2,250*l.*, according to the conditions at the sale thereof, on the 14th inst.—Mark Snelson, Joseph Cotman.” The following were some of the conditions of sale referred to in the agreement: viz. “The purchaser must pay to the auctioneer, the whole of the auction duty upon his or her purchase immediately after the sale, and at the same time to the vendor or his agent a deposit of 10*l.* per cent. upon, and in part payment of the purchase-money, and enter into an agreement (to be stamped at the equal expense of the vendor and purchaser,) for payment of the remainder at Lady-day next, at which time the purchaser will have possession of the premises, and to pay interest after the rate of 4*l.* 10*s.* per cent. per annum, upon the residue of the purchase-money from that time until the payment thereof.” The sum of 220*l.* was forthwith paid as a deposit upon the purchase-money by Cotman, the purchaser, to Snelson, the solicitor and agent of Orton. Snelson was at the time the deputy steward of the manor of which the lands sold were holden. Shortly after the sale, and before any settlement had been come to between the parties as to the title to the lands, Cotman at the request of Snelson, who acted as the agent and attorney of Orton, paid to Snelson (through the medium of several bills of exchange, which were drawn and accepted by Cotman, and afterwards duly paid by him,) the sum of 500*l.* as further part of the purchase-money. Early in March 1833, a sub-contract was entered into between Cotman and a person named Winterton, when the conditions of sale were varied, and such sub-contract was as follows: “Memorandum, I acknowledge to have had and received of Mr. R. S. J. Winterton 220*l.*, being a deposit, and in part payment, for certain lands, the property of W. Orton, situate at Sketchley, and which I have purchased at or for the sum of 2,250*l.* (timber and buildings included,) and which I purchased, and have given up to the said Mr. Winterton. March 25, 1833.—Joseph Cotman, R. S.

Jacques Winterton. Witness, E. K. Jarvis.” Orton was no party to the sub-sale; the deposit of 220*l.* was afterwards repaid to Cotman by Winterton, and the sub-purchase by Winterton completed, at a meeting on the 6th of May 1833, at which all the interested parties were present, when Orton refused to permit the sum of 500*l.* received by Snelson, as his agent and attorney, from Cotman, to be paid Cotman out of the residue of the purchase-money, payable by Winterton to Orton. Cotman thereupon claimed to have a lien on the lands sold, in respect of the 500*l.*, part of his purchase-money, paid by him to Snelson. Snelson, in addition to the deposit of 220*l.*, which had been repaid Cotman, had received 300*l.* from Winterton in part payment of his purchase-money, on Snelson forwarding to him the surrender of the lands, signed and executed by Orton. No objection was ever taken on the part of Orton to Snelson's receipt of that sum, as part of the purchase-money. Snelson prepared the conditions of sale preparatory to the lands being put up to public auction, without communicating thereon with Orton; and in 1831, when the sum of 1,200*l.* was raised by mortgage of Orton's estate, that sum did not pass through Orton's hands, but was wholly appropriated and paid away by Snelson and his then co-partner. On the hearing of a criminal charge before the magistrates, brought against Snelson by Cotman, for receiving the said sum of 500*l.* from Cotman, and appropriating it to his own purposes, Snelson admitted having done so, and without the authority of Orton. Much correspondence between Snelson and Orton was adduced as evidence on the part of Cotman, shewing that Snelson was the solicitor and general agent of Orton. One letter written by Orton to Snelson, was as follows:—“London, November 3, 1812,—Dear sir, On my arrival in London, I found I had more to pay than what I expected when in the country, and therefore shall be obliged by your sending me 40*l.* or 50*l.*, as soon as convenient, as I don't like to be short of money in London. Hope yourself and Mrs. Snelson are well. Direct to me, 26, Jewin Crescent, Aldersgate Street.—Mark Snelson, Esq. solicitor,” &c.

The bill was filed by Cotman, the first

purchaser, against Orton and Winterton, and very briefly prayed a declaration by the Court, that, under the circumstances stated, the plaintiff was entitled to a lien upon the copyhold lands, the subject of sale; and that the sum of 500*l.* and interest might be repaid to the plaintiff by the defendants; or else that the same might be raised by sale or mortgage of the said copyhold lands, or of a sufficient part thereof.

Evidence at some length was adduced on behalf of the plaintiff and defendants. The defendants joined in their answer and defence.

Mr. Cooper and *Mr. Dixon*, for the plaintiff, insisted, that the different circumstances proved, shewing the general employment and agency of Snelson by Orton; and his intrusting Snelson, who was a solicitor, during the whole period of the transaction relating to the sale, with the management of Orton's affairs, justified the filing of the bill against Orton, and that Winterton was necessarily a party to the suit.

Mr. Wigram and *Mr. Rogers*, for the defendants, contended, that the material allegations of the answer were not contradicted by the plaintiff's evidence, which was very evasive in its nature; that the acts of Snelson were not confirmed in any way by Orton; that there was no pretence that Snelson had the general authority of Orton to vary his contracts, or that he had any special authority from Orton to receive the sum of 500*l.*, paid him by Cotman; they cited *Parnter v. Gaitskell* (1).

The LORD CHANCELLOR.—As against Orton, the bill must be dismissed, with costs, on the ground that he is not a necessary party. The contract of assignment is peculiarly worded, but there is no contract on the part of the defendant Winterton to pay the purchase-money to the plaintiff; but the complaint is, that there was notice given that the 500*l.* had been paid by the plaintiff to Snelson, and therefore the plaintiff had a lien on the lands to that amount; and if the money was properly paid, the bill is rightly framed as against the defendant Winterton. The sole

question is, whether the payment of the 500*l.* to Snelson was a good payment. The bill puts the case on a special and general authority given by the vendor to Snelson to receive the 500*l.*; and the purchase-money was paid without a conveyance having been executed of the legal estate, and on the supposition that the contract would be performed. The plaintiff's own evidence proves there was no special authority given; the case rests then entirely on the supposed general authority; and if *Parnter v. Gaitskell* be right, it is conclusive between the present parties; for Bayley, J., in that case, says, "The rule is, that if a purchaser pay his money to the agent of the vendor, before the time when the latter is authorized to receive it, he makes that agent his own for the purpose of paying over the money to the right owner." In the case of *Whitehead v. Tuckett* (2), Lord Ellenborough distinguishes between a general authority and an unqualified authority, and says, "It may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance." In the case before me, a contract is made for the sale of certain lands, and the payment of the purchase-money is to be made at a future day; but before the day for payment arrives, the attorney of the vendor applies to the purchaser to pay the amount to him. There was no course of dealing in this case to raise a general authority; nor is there anything to shew that Orton knew of any such general authority. It is clear, then, on the authorities, there was nothing in this case to justify the plaintiff's saying, that Snelson was acting as the agent of Orton, in receiving the purchase-money, although he was Orton's agent for carrying the contract into effect; consequently the 500*l.* cannot be considered as a payment made to Orton, on account of the purchase-money. The bill must therefore be dismissed as against Winterton also. Then as to costs:—generally speaking, it is but justice that the party failing should pay

(1) 13 East, 432.

(2) 15 East, 400.

the costs, the party succeeding being supposed generally to have the right on his side; but here the defendant Winterton has put himself in the front of the battle; and if he chooses to fight the battle of another, he cannot complain if he gets no costs, though he win the battle. The bill must be dismissed as against Orton, with costs; but against Winterton, without costs.

V.C.
Jan. 15; Apr. 24; } HULKES v. DAY.
May 30; Nov. 30. }

Act abolishing Arrest on Mesne Process, 1 & 2 Vict. c. 110. s. 14—3 & 4 Vict. c. 82. s. 2, Construction of—Charge of Judgment Debt on Funds in Court—Jurisdiction—Petition for Stop-order—Service on Prior Incumbrancers or Claimants.

The order of charge upon funds, or an interest in funds, belonging to a judgment debtor, under the act 1 & 2 Vict. c. 110, must be made by the Judge at law, and cannot be made by a court of equity.

Funds standing in the name of the Accountant General, as well as in those of private trustees, are chargeable under the act.

The judgment creditor whose debt is charged upon a fund in court, may apply for and obtain a stop-order before the expiration of six months from the date of the order of charge.

The order of charge is not void, though it extends to the whole of a fund in which the debtor has only a partial interest, but it will be made to operate only upon such partial interest, and the stop-order will be limited accordingly.

A party applying for a stop-order on a fund in court, must take the order subject to, and after satisfaction of, all the prior claims upon the fund; or he must serve all the parties having such prior claims with the petition.

The several sums of 8,330*l.*, 1,909*l.*, 1,009*l.*, and 1,107*l.* stock, were standing to the credit of this cause to the separate "account of the defendant Charles Day, the infant," to which he was entitled on attaining the age of twenty-three years. In November 1837, C. Day assigned his

interest in these funds to M. & E. Taverner, to secure a loan of 1,800*l.*; and the common stop-orders on the principal sums, and on the dividends, were obtained by the mortgagees. Shortly afterwards, in the same month of November, C. Day executed a settlement, whereby he assigned all his interest in the same funds, to trustees, upon trust, to apply the dividends during the life of C. Day, as he should appoint, but not by way of anticipation; and in default of appointment to pay the same to him; and if he should do any act whereby the funds or income became invested in any other person, to apply the same for the benefit of himself, and any wife, child, or children he might have; and after the decease of C. Day, to pay the dividends to any widow he might have; and if no widow, for the benefit of his children; and on failure of issue upon such trusts as he might appoint, and, in default of appointment, to his next-of-kin. A stop-order was obtained by the trustees. The mortgagees filed a bill in February 1839, to obtain payment of the sum secured; and an order was made, referring it to the Master to take an account of what was due to them. On the 6th of February 1839, J. Williams recovered final judgment in the Exchequer, against C. Day, for the sum of 706*l.* 2*s.* 6*d.*, for damages and costs, and on the same day judgment in the action was duly entered up.

C. Day attained his age of twenty-three years, in November 1839. Upon these circumstances, and upon an affidavit of the said J. Williams, that the whole of the judgment debt, with interest thereon, from the 6th of February 1839, remained due to him, and that he had not caused the person of Day to be taken in execution upon the judgment, a motion was made on the 2nd of November 1839, on behalf of Williams, the judgment creditor, for an order, that the said several sums of stock "should not be transferred, sold out, or otherwise disposed of, without notice to J. Williams, and that the defendant, C. Day, should, within fourteen days after notice thereof to his clerk in court, shew cause unto this Court, why the said stock should not be charged, pursuant to the act 1 & 2 Vict. c. 110, intituled, &c.

The VICE CHANCELLOR made the order.

January 15.—*Mr. Shadwell* now shewed cause on behalf of *Charles Day*.—First, the statute (1) charges funds standing in the name of another, in trust for the debtor, but not funds which stand in the debtor's name in trust for others, which is the case with the stock now sought to be affected. This stock has been actually assigned to trustees; and if the creditor would set aside the settlement as voluntary, he must proceed in another way. While the settlement stands unimpeached, it must be taken to be valid. Secondly, the trustees have had no notice of the application for the order, which is alone a sufficient objection to it.

Mr. K. Bruce and *Mr. C. C. Barber*, *contrâ*, were not heard.

THE VICE CHANCELLOR.—The funds in question stand in the name of the Accountant General, in trust for *Charles Day*; and to part of these funds he is to be absolutely entitled, on attaining the age of twenty-three. *Mr. Day* attained that age in November 1839. It appears, that on the 11th of November 1837, he executed an assignment of these funds, to secure the sum of 1,800*l.* and interest. On the 21st of November 1837, *Mr. Day* executed an instrument, which was merely voluntary, whereby he assigns the same fund in trust for himself, with limitations in remainder for the benefit of some possible wife and some possible children. The question is, whether, as the fund does actually stand in the name of the Accountant General, to the separate account of *Charles Day*, these assignments and stop-orders have altered the case. The fund, in fact, stands in the name of the Accountant General, in trust for *Mr. Day*; and I therefore think, that it is within the 14th section of the act.

Another observation on the case is, that the present application to shew cause, is not made on behalf of the persons who are trustees, or who are otherwise interested in the assignment, but it is on behalf of *Charles Day* himself; and the order must certainly be binding upon him. I think that no sufficient cause has been shewn against making the order absolute.

The order was made absolute, accordingly.

(1) 1 & 2 Vict. c. 110. s. 14.

April 24.—The Lord Chancellor having, in a case before him, on appeal from the Rolls, held, that the act empowered only a Judge of the court of common law to make the order, charging the fund, and not the courts of equity; the Vice Chancellor directed that the orders *nisi* and absolute, which had been made in this court on the application of the judgment creditor, should be discharged.

Mr. Williams, the judgment creditor, then applied to a Judge of the Court of Exchequer, and by an order, dated the 5th of May 1840, made by Baron Rolfe, it was ordered, that unless cause should be shewn to the contrary, before him, or before such other Judge as should then be in attendance at the Judges' chambers, within nine days from the date of the said order, the said several sums of 8,330*l.*, 1,909*l.*, 1,009*l.*, and 1,107*l.* stock, standing in the name of the said Accountant General, in trust in these causes, to "the account of the said defendant *Charles Day*," should stand charged, and should in the meantime stand charged with the payment of the said sum of 706*l.* 2*s.* 6*d.* to the said *J. Williams*, being the amount for which judgment had been recovered in the said action by him, against the said defendant, *Charles Day*, and interest thereon, pursuant to the 1 & 2 Vict. c. 110.

By another order, of the 21st of May following, made by Baron Rolfe, upon hearing counsel for the said *C. Day* and *J. Williams*, the order of the 5th of May was made absolute. *Mr. Williams* then presented his petition, intituled in the cause to the credit of which the funds stood, praying that neither of the said sums of stock, nor any part thereof, might be transferred, sold out, or otherwise disposed of, without notice to the said petitioner.

May 30.—*Mr. K. Bruce* and *Mr. C. C. Barber*, for the petition.

Mr. Jacob and *Mr. Purvis*, for the defendant and judgment debtor, *C. Day*, objected, that the mortgagees of the fund, and the trustees under the subsequent settlement, who had obtained previous stop-orders, ought to be served with the petition, and that they would be prejudiced by the order sought to be obtained in their

absence. They cited *Drevor v. Mawdesley* (2).

Mr. K. Bruce, in reply.—We do not dispute the title of the mortgagees, nor de-

sire in any way to affect them. Neither the mortgagees nor the alleged trustees are parties to this cause. It cannot be the rule, that if A obtains a stop-order, B, a subsequent claimant, must serve A in order to obtain a similar order. There can be no payment without notice to the former.

(2) V.C. Nov. 12, 1836.—The following is the reporter's note of this case:—"By the Master's report in the cause, made in January 1837, it appeared that the sum of 63,535*l.* was due to Collett and Derbyshire, as trustees for certain persons who were assignees of Mence and Newnham. Certain sums of stock and cash were in court, applicable to the payment of the debts composing the above gross sum. The rights of the respective assignees of Mence and Newnham had been the subject of an award made in 1822, by which it was ordered, that the assignees of the entire fund should pay to Owen, as the assignee of Mence, the sum of 8,000*l.*, and that the residue of the monies should be paid to Newnham. Newnham subsequently assigned his interest in the residue, by way of mortgage, to Gompertz, and Gompertz assigned the same to Hovil. In October 1837, Hovil preferred a petition to the Lord Chancellor, and obtained a common stop-order, to the effect that no part of the fund of 63,535*l.* should be paid out of court, without notice to him, Hovil. Owen, Collett, and Derbyshire were not parties to the cause, and were not served with the petition; but their prior claim under the award was stated upon it: the parties to the cause only were served. Several other stop-orders on the same fund were made on the applications of other persons claiming under Newnham, but such orders were made, after service of the respective petition, upon Owen, Collett, and Derbyshire, and were qualified so as not to restrain Collett and Derbyshire from receiving out of the fund the 8,000*l.* and interest due to Owen. The Master, in August 1839, reported that he had apportioned the funds then applicable to the payment of the debts, and that 3,480*l.* cash, part thereof, was due to Collett and Derbyshire as trustees for Owen. The payment of this sum being prevented by the stop-order which Hovil had obtained, Owen, Collett, and Derbyshire presented their petition, praying that that order might be discharged with costs.

Mr. Jacob and *Mr. Hallett*, for the petition.

Mr. Spurrer, in support of the order, insisted that it was not the practice to serve incumbrancers on a fund, unless they were parties to the cause; and that it was left to the latter to see that other persons were not prejudiced.

The VICE CHANCELLOR said, that it was a strange proposition to urge in a court of equity, that a party, having a claim upon a fund, and being at the same time aware that another person had a prior and a better claim, had a right to procure an order prejudicial to, and placing an impediment in the way of, such other and better claim. His Honour said, that if his attention had been called to the fact, that the parties entitled to the prior charge had not been served with the petition, the order would not have been made in their absence.

[The order was accordingly discharged with costs; and upon a cross petition by Hovil, another order was made that no part of the 63,535*l.*, except the 8,000*l.*, should be paid without notice to him.]

The VICE CHANCELLOR said, that the order ultimately made in *Drevor v. Mawdesley* was, that no part of the fund should be paid out of court, beyond the sum due to the party entitled to the first charge upon it; and that in this case the order must be taken as to that part of the fund which should remain, after satisfying the prior claimants; or they must be heard. His Honour said, he thought it was expressly so decided in *Drevor v. Mawdesley*. [The petition stood over that the other claimants on the fund might be served.]

Nov. 30.—*Mr. K. Bruce* and *Mr. C. C. Barber*, for the petition.

Mr. Jacob and *Mr. Purvis*, for Charles Day.—The petition is a proceeding under the act to have the benefit of the charge made by the Judge's order, and therefore it is premature and erroneous, as being commenced before the expiration of six months from the date of the order. Here also, the judgment debtor is but partially interested in the fund which is sought to be charged—*Doe d. Hull v. Greenhill* (3). The subsequent statute (4) in some measure varies the first act; for by the first act the Judge was empowered to order that the stock and funds should stand charged, while in the second act the expression confines it to the interest of the judgment debtor therein. The order therefore, if made, must be strictly limited to the interest of the debtor, and that must be first ascertained.

Mr. Norton, also for C. Day, appearing by authority of the trustees under a power in the settlement.

Mr. Spence, for the mortgagees.

Mr. Wigram and *Mr. Shadwell*, for the trustees.

Mr. K. Bruce, in reply.—The present petition is not a proceeding to have the

(3) 4 B. & Ald. 684.

(4) 3 & 4 Vict. c. 83, s. 1.

benefit of the charge, but it is a proceeding to secure the property, so that it may be forthcoming when the benefit of the charge can be had in a suit which the petitioner has instituted for that purpose. In the interval between the orders *nisi* and absolute, the creditor is protected. The fifteenth section restrains the Bank from permitting a transfer until the order is made absolute or discharged: and is he to be in a worse situation after the order is made absolute? The case of *Doe v. Greenhill* was cited in the argument before Baron Rolfe, and was held not to apply.

The VICE CHANCELLOR.—The only question is, whether the Court shall make a stop-order on the fund in question, upon the petition of the judgment creditor. Before the passing of the second act, I had a communication with the Lord Chancellor, with respect to the effect of the first act; and his Lordship considered, that the charging order must be made by the Judge at law. No doubt however was entertained, that the Judge at common law was empowered by the act to make an order, which would have the effect of charging a fund in court. If any such doubt had existed, it is clearly removed by the second act, which declares what the construction of the former act shall be. I do not think that the case of *Doe v. Greenhill* has any bearing on the question. That case appears, upon the simplest construction of the statute, to have been rightly decided, for the reasons assigned by Lord Tenterden. It seems to me clear, that where the Accountant General holds a fund in trust for A and others, he is a trustee for A, and others, and that he is literally within the words of the statute; and then why is not the interest of A to be charged? By the second act, it is declared and enacted, that the provisions of the first act "shall be deemed and taken so extend" to the interest of the debtor, which is thereafter described. This is a statutory declaration of the effect which the recited statute is to have; and whatever time might have intervened since the order under the first act was made, the construction given to it by the subsequent act must apply to that previous order; and, therefore, according to that construction, the debtor's interest

in the fund, whether in the hands of a private trustee, or of the Accountant General, is subject to the charge. It is then said, that the order of Baron Rolfe is too extensive, inasmuch as it charges the whole of the stock in question with the judgment debt of Williams. In terms, the order certainly appears to apply to the whole; but, though it cannot be made to affect the whole fund, it is not therefore void as to the interest which the debtor had. It binds such interest in the stock as he actually had at the time the order was made. Taverners' interest under the mortgage must be excepted from the operation of the stop-order, and they must be paid their costs of appearing upon the petition. As the application is purely for the benefit of the petitioner, Day must also be paid his costs of the petition; but the costs of the trustees should be reserved, until it be seen whether they have in fact any interest in the fund.

Order accordingly.

M.R. } THE ATTORNEY GENERAL v.
Nov. 14. } STRUTT.

Practice.—Production of Title-deeds.

A rent-charge had, for many years, been paid by the owner of a farm to a charity, and had never been refused. An information was filed, claiming the land out of which the rent-charge had been paid. The defendant, by his answer, contended, that the charity was not entitled to more than the rent-charge; that it was uncertain which were the lands charged; and that the party under whom he claimed was a purchaser, without notice, for valuable consideration. He admitted that he had title-deeds which constituted his own title, but denied that they shewed the title of the claimants:—Held, that in this stage of the cause he was not bound to produce his title-deeds.

This was an information, which prayed a declaration, that certain freehold hereditaments in Essex, of which the first-named defendant, Joseph Holden Strutt, was tenant for life, were devised as an endowment for some alms-houses, under the will of a Richard Tweedy, in 1574.

The hereditaments were purchased by the father of the first-named defendant in 1787, at an auction, and in the particulars of sale they were described as "subject to the rent-charge of 13*l.* 12*s.* per annum, to the poor of Stock and Boreham;" and in some of the title-deeds this charge was referred to, as having been "given by Richard Tweedy, Esq."

The defendants deduced their title under a feoffment made by a Richard Tweedy, in January 1606, in which no mention was made of any rent-charge, or of the will of the testator Richard Tweedy; but the rent-charge had for many years been regularly paid. They contended, that, under the terms of the will of Richard Tweedy, the charity was not entitled to more than a rent-charge; that it was not certain which were the lands affected by the devise in Tweedy's will; and that as the father of the defendant, Joseph H. Strutt, was a purchaser for valuable consideration, without any notice of the claims of the charity, no relief ought to be given against any person claiming under him.

Mr. Joseph H. Strutt admitted, in his answer, that he had "in the second schedule, thereto annexed, set forth a list of the title-deeds, *papers and writings* relating to the premises in question in the cause, and also relating to other premises; which title-deeds, papers, and writings were then in his possession or power, on behalf of all the parties having interests under the will of his father in the said demised premises, but he (Joseph H. Strutt) said, that the said title-deeds constituted the title of the parties claiming the premises under the will of his father, and did not constitute, make out, or evidence the alleged title of the said charity."

A motion was now made for the production of the documents admitted by Mr. Strutt's answer to be in his possession.

Mr. Pemberton and Mr. Blunt, for the motion.—No objection can be raised as to the papers and writings. With respect to the title-deeds, the Attorney General is entitled to the production of them, in order to see whether the title of the charity is not admitted in those deeds from time to time. The defendant also raises a question as to what lands are charged; and the title-deeds ought to be inspected

to remove this question. It is admitted, that a charge created by Tweedy is mentioned in the title-deeds; and if a purchaser has notice of the charge, he has notice of the claim of the charity, whether that claim is for a charge only, or for the whole estate.

Mr. James Russell, for Mr. Strutt; and

Mr. Kindersley, for remainder-men.—

A party has a right to inspect title-deeds which relate to his title in common with the title of the possessor of the title-deeds; but here the charity claims the estate, and repudiates the rent-charge. The defendant admits that the estate is subject to a rent-charge, which he has never refused to pay; and, therefore, the party who receives it has no claim—has no right to call for the title-deeds. Some right must be shewn to that which is claimed by the information, namely, the whole estate, before the defendant can be called upon to shew his own title-deeds—*Adams v. Fisher* (1).

Mr. Pemberton replied.

THE MASTER OF THE ROLLS.—With respect to the documents other than the title-deeds, the defendant has taken no ground of protection or defence; therefore they must be produced. With respect to the others, the question is, whether, in the present state of the record, the Attorney General has now a right to the production of them. I cannot doubt but that in the progress of this cause, the production of these documents may be very important, but the production must be placed on grounds which will render it impossible for the defendant to resist. I cannot say that the matter is now in that state.

The defendant is a purchaser without notice, and he says, that these deeds do not connect the rent-charge with the origin of this charge in 1574. Therefore the defendant may be right in saying, that these title-deeds relate to his title solely. I decide this with reference to the present state of the cause only.

(1) 3 Myl. & Cr. 526; s. c. 7 Law J. Rep. (N.S.) Chanc. 289.

L.C.
May 28; Nov. 17. } TURNER v. BORLASE.

Pleading—Demurrer—Want of Parties—Want of Equity—Legal Estate.

The allegations of the bill were to the following effect, viz. T. and J. G. were entitled between them to one-half of the shares of certain mines as adventurers; J. G. became indebted to the other adventurers, and assigned, by deed of November 4, 1819, some of his shares to raise money for payment of his debt. T. and J. G. afterwards became bankrupts; when it was agreed between their assignees and the other adventurers, that the mines should be sold, the shares of the remaining shareholders being re-purchased; that the shares of T. and J. G. should be sold, and the proceeds applied in payment of the debt due to the company; and that the purchasers thereof and the old shareholders should constitute a new company. The arrangement was carried into effect by means of a decree in the Vice Warden's Court of the Stannaries of Cornwall; and, for the purpose of facilitating the arrangement, the then assignees of T. and J. G. nominally relinquished their shares. It had been previously agreed between the assignees and the other adventurers, that certain other persons should become purchasers of such relinquished shares, and, amongst others, that R. T. should have $\frac{2}{5}$ th afterwards increased to $\frac{3}{5}$ th shares between himself and partners, who traded under the name of the Gweek Company, and C. T. should have other shares: the sale under the decree was fictitious, the sums and future shareholders having been, previously to the sale, agreed upon: the shares so purchased were part of the shares of T. and J. G. and the old and new company were the legal owners of the said shares, and had notice of all the circumstances stated in the bill in respect of the manner in which the shares of T. and J. G. had been dealt with, and such company could not, therefore, hold such shares against the creditors of T. and J. G. The defendants were the existing partners in the Gweek Company, R. T. having died. The bill filed by the assignee of T. and J. G. within twenty years from the occurrence of the alleged circumstances, prayed a restoration of the shares so purchased as aforesaid for the

Gweek Company, and an account of the interim profits, and a receiver of the said mines.

Demurrer to the bill, for want of equity and want of parties, held bad; and it was held, that neither the other adventurers, nor the personal representatives of R. T. or C. T., nor the trustees of the deed of 4th November 1819, were necessary parties.

The bill in this case was filed by the surviving assignee of the estate of Thomas Gundry and John Gundry, bankrupts, both deceased; and it was thereby alleged, that previously to October 1819, the said Thomas and John Gundry were adventurers, with several other persons, in certain tin and copper mines, called "The Wheal Vor consolidated Mines," situate in Cornwall: that in October 1819 Thomas Gundry was entitled to $\frac{2}{5}$ th shares, John Gundry to $\frac{3}{5}$ th shares therein; and that $\frac{1}{5}$ th shares, part of the $\frac{2}{5}$ th shares in the mines, belonging to Thomas Gundry, were at the time assigned on mortgage: that previously to, and in October 1819, John Gundry became embarrassed in his circumstances, and, in his character of purser to the mines, greatly indebted to his co-adventurers: that on the 4th of November 1819, John Gundry, by deed of that date, assigned $\frac{1}{5}$ th shares in the mines to trustees, for securing the payment of his debt due to his co-adventurers: that in January 1820, both J. and T. Gundry became bankrupts: that on the 23rd of February 1820, a meeting of all the adventurers, except J. and T. Gundry, was held at the mines, when it was resolved and agreed, that a new company should be formed, and that one-half of the then shares in the said mines, being about the amount of interest which the bankrupts had therein, should be disposed of; and that a sale of the mines should take place, through the medium of a decree in the Court of the Vice Warden of the Stannaries; and that there should be a re-purchase by the old adventurers, in conjunction with the new adventurers in the mines: that the produce of the shares of the bankrupts in the mines should be applied in payment of the debt due from the said John Gundry: that Richard Tyacke, who at that time was the purser of the mines, and carried on a considerable business, with other

persons, as merchants, in partnership, at Gweek, in the vicinity thereof, agreed, on behalf of the partnership which was known as the "Gweek Company," to purchase $\frac{1}{8}$ th shares in the new company: that in February 1820, the assignees of T. and J. Gundry relinquished to the other adventurers in the mines all the bankrupts' shares, pretending that the debts due from the bankrupts exceeded in value the amount of the bankrupts' shares: that the consent of the creditors of the bankrupts was never required to such relinquishment: that, amongst other persons, Richard Tyacke completed his purchase of $\frac{1}{8}$ th shares in the mines, and Charles Trelawny took $\frac{1}{8}$ th shares in the mines under the new arrangement: that such last-mentioned purchases, together with other purchases of shares in the mines, were confirmed in May 1820 by a decree pronounced by the Vice Warden, on the petition of several of the adventurers, against the assignees of T. and J. Gundry and others of the adventurers, who claimed a debt of 2,897*l.* against the estate of the bankrupts, for goods sold and delivered by order of John Gundry whilst purser of the mines, for the use of the adventurers generally, and upon their credit: that by such decree a sale was directed, for the purpose of carrying into execution the arrangements previously entered into: that on the 2nd of June 1820 resolutions were entered into between the adventurers, by which Humphrey Millett Grylls was authorized to purchase the mines, including machinery, ores, stuff, &c. at 18,000*l.*; and the shares in the mines were afterwards increased from 58ths to 54ths, and subsequently, from 54ths to 50ths: that the several persons mentioned in the resolutions of the 2nd June 1820 as purchasers of the shares in the mines (of whom Richard Tyacke was one), entered into the possession thereof, according to the number of their respective shares appearing by those resolutions, and the names of such persons were duly entered in the cost-book of the said mines on the 6th of June 1820, and the legal estate in the said mines became vested in such persons accordingly: that the shares which Richard Tyacke purchased under the said sale and new arrangement, were part of the shares of the bankrupts previously and fictitiously

abandoned by the assignees: that the purchase of the shares of the bankrupts was void in equity: that Richard Tyacke, on behalf of the Gweek Company, subsequently to such aforesaid decree (which was confirmed in the usual way) and sale, took a transfer of $\frac{1}{8}$ th and $\frac{1}{8}$ rd of $\frac{1}{8}$ th shares in the mines, originally belonging to the bankrupts, from two of the purchasers thereof, under the sale directed by the decree of the Vice Warden: that Richard Tyacke continued to be a partner in the Gweek Company, and also purser of the mines, till his death in 1825: that the Gweek Company had ever since continued to carry on business, and to be interested in the mines, in the shares before stated, viz. in $\frac{1}{8}$ ths and $\frac{1}{8}$ rd of $\frac{1}{8}$ th: that the defendants were the parties constituting the Gweek Company: that all the legal estates and interests of and in the last-mentioned shares in the said mines were then vested absolutely in the defendants, and the said shares were then in the joint order, possession, and controul of the defendants: that the defendants were trustees for the benefit of the creditors of the bankrupts: that a bill had been filed against Charles Trelawny in respect of the $\frac{1}{8}$ th shares purchased by him under the sale directed by the Vice Warden's decree.

The bill prayed a transfer of the shares so purchased on behalf of the Gweek Company, and a declaration in the plaintiffs' favour of the interim profits, and an account of such profits from the time of the purchase; and that a receiver might be appointed, "to receive the profits arising from the said mines."

The defendants put in a demurrer to the bill, for want of equity and want of parties, which was overruled by the Vice Chancellor on the 2nd of May 1840. All the defendants, except Richard Cornish, appealed from his Honour's decision.

Mr. Knight Bruce and *Mr. Sutton Sharpe*, in support of the appeal, contended, first, that the new concern was divided into new shares, without any reference to the old partnership or company; and that the new adventurers ought to be parties to the suit: secondly, that Richard Tyacke being dead, his personal representatives ought to be before the Court: thirdly, that the personal representatives of Charles

Trelawny, who was dead, ought to be before the Court: and fourthly, it was objected, that the trustees of the deed of the 4th of November 1819, were not parties to the suit. It was also urged, that the lapse of time since the circumstances arose, was a good objection to the bill, the case being one relating to mines, and the onus of accounting for the delay being thrown on the plaintiff. It was also insisted for the appellants, that the old adventurers were as much new adventurers as the new adventurers were; for the sale that took place was not of the share of the Gundrys, but of the entire mines, the sale of Gundry's shares being vicious and impracticable: that the original concern no longer remained, and the plaintiff had no right to deprive the defendants of their claim for contribution and account against the other purchasers of shares, who were not parties to the suit: that the statement in the bill, that the defendants' shares were part of Gundry's shares, was merely one of inference, and not of fact, the other statements in the bill contradicting that statement: that Richard Tyacke, for some years before his death, was a partner in the Gweek Company, and, previously to the sale to him of the shares on behalf of that company, was the purser and receiver of the profits of the mines; and that his personal representatives were necessary parties: that, in a case of trustees, all of them must be parties, in order to recover the whole that may be found due against each of them; and that the resolution of the 23rd of February 1820 shewed that the deed of November 1819 was not a nullity.

Mr. Jacob, Mr. G. Richards, and Mr. B. S. Follett, for the respondent.—As regards the demurrer for want of equity, no argument is advanced to shew that the plaintiff is not entitled to some relief.

[*The LORD CHANCELLOR*.—The bill having been filed within twenty years, the lapse of time is no defence, unless there has been acquiescence.]

The demurrer does not shew who are necessary parties. *H. M. Grylls* is named in the bill, and so is *Charles Trelawny*, and they cannot be necessary parties. The case must be such an one, to justify the demurrer, that a mere addition of names is sufficient to make a case against those

parties. The defendants have obtained possession of mines belonging to the respondents, which the latter are entitled to recover against them; the transactions as to the different purchases are perfectly separate and distinct—*Mare v. Malachy* (1).

The LORD CHANCELLOR.—The only question in this cause is, whether the bill is defective for want of parties, there being no ground whatever for the objection for want of equity. As to parties, the case being complicated, some difficulty arises in comprehending the facts, so far as they are applicable to that point; when understood, I do not think there is much difficulty, due regard being had to the allegations in the bill. Four objections were made for want of parties, on account of the absence, first, of the new adventurers in the mine; secondly, of the representatives of *Richard Tyacke*; thirdly, of the representatives of *Charles Trelawny*; and fourthly, of the trustees of the deed of the 4th of November 1819.

The facts, as stated in the bill, so far as they apply to these several points, are as follows:—That *Thomas and John Gundry* were entitled to one-half, or nearly one-half of the shares in the original adventure; and *John*, having become indebted to the other adventurers, as purser of the mine, assigned some of his shares, as trustee or otherwise, to raise money for payment of the debt; that the *Gundrys* having afterwards become bankrupt, an arrangement was agreed on between the then assignees and the other adventurers, that the whole of the mine should be sold, the shares of the remaining shareholders being repurchased by them, and that the shares of the *Gundrys* should be sold, and the proceeds applied in payment of the debt due to the company, and that the purchasers and the old shareholders should constitute a new company. (This arrangement was carried into effect by means of a decree in the Vice Warden's Court, for the sale of the mine and the property belonging to it, at the suit of certain creditors of the mine, who lent their names for that purpose; and for the purpose of facilitating that object, the then assignees of *Messrs. Gundry* nomi-

(1) 1 Myl. & Cr. 559; s. c. 5 Law J. Rep. (n.s.) Chanc. 345.

nally relinquished.) That it was previously agreed that certain other persons should become purchasers of some of such shares, and, amongst others, that Richard Tyacke should have $\frac{1}{8}$ ths, afterwards made $\frac{1}{4}$ ths, between himself and partners in the Gweek Company; that the trustees of Charles Trelawny was to have others of such shares; that the sale under the decree was nominal and fictitious, the sums and the future shareholders having been previously agreed upon; that the new company so became possessed of $\frac{1}{4}$ ths, and was so entered in the cost-book of the mine; that such $\frac{1}{4}$ ths were part of the shares of the Gundrys, which had been so relinquished; that the two companies were legal owners of the said shares; that they had notice of all the circumstances stated in respect of the manner in which the shares of the Gundrys had been dealt with, and that such company was 'not therefore entitled to hold such shares against the creditor of the Gundrys represented by the plaintiff, the assignee.

The defendants are the existing partners in the shares of the mines, purchased on behalf of the Gweek Company, Richard Tyacke being dead. The bill prays that such shares may be restored to the estate of the Gundrys, on such terms as the Court may think fit, and for an account of the profits of such shares received by the defendants; that a receiver may be appointed to receive the profits arising from such mines, and that all accounts may be ordered for effectuating the purpose of the suit. This, therefore, is a very distinct statement that the shares sought to be recovered from the two companies, were part of the shares belonging to the Gundrys, and were possessed by the companies under a sale impeached as fraudulent. Upon the case as stated, I think the other adventurers and the partners of such shares, are not necessary parties to the suit, and that they would not have been properly made parties to the bill, containing such allegations. I see no reason for departing from the opinion I expressed in the case of *Mare v. Malachy*, on this subject.

It is, however, observed, that the bill prays a receiver of the profits arising from such mines. If that must be understood to mean the general profits of the mines,

it would be asking that which would not be granted in the absence of all the partners. I do not understand the expression to have that meaning. All the case made, and relief asked, relates to the particular shares possessed by the Gweek Company, and the profits they have received therefrom: I must understand the term profits, with reference to the prayer for a receiver, as meaning the profits before spoken of, which makes the whole consistent, and for which purpose the other adventurers would not be necessary parties.

As to the representatives of Richard Tyacke and Charles Trelawny, those persons are represented as being purchasers of the other shares belonging to the Gundrys, under the decree for sale, it is true, but by distinct purchases; as such they are not necessary parties, and would not be proper parties to such suit.

As to the proprietors of the Gweek Company, Richard Tyacke being dead, all his interest is merged in his surviving partners.

It only remains to consider the objection that the trustees of the deed of the 4th of November 1819 are not parties. The other adventurers in the mine, were the *cestuis que trust* of the deed. The bill alleges subsequent transactions between the assignees of the author of the deed, John Gundry, and such *cestuis que trust*, by which the objects of that deed were accomplished, namely, the sale of the shares, and payment, out of the proceeds, of the debt due from Gundry; and thus the bill alleges, that all the legal estate and interest of and in all the said several last-mentioned shares, are now vested in the defendants. The trustees of the deed of 1819, according to these allegations, have no estate or interest in those shares. I am of opinion, for the reasons I have expressed, that the demurrer, for want of parties, cannot be supported: and the order of the Vice Chancellor must be affirmed with costs.

I have minutely stated the grounds on which I have come to this conclusion, because, if the allegation in the bill on which my judgment on the demurrer necessarily depends, be not according to the fact, there may, on the hearing, be grounds for the objection for want of parties; the opinion I now express, cannot have any bearing on such a case.

M.R. }
 Nov. 20. } **HAWKE v. KENT.**

Practice.—Separate Motions—Costs.

Where a defendant admits by answer the possession of documents, and a balance of money, it is irregular to move for the production of the former, and payment into court of the latter, by two separate motions, but they ought to be included in one; and the Court in this case ordered the plaintiff, who had made two separate motions, to pay the extra costs occasioned by this irregular practice.

The defendant, in his answer, admitted to have in his hands certain deeds and documents, and a balance of the estate in question in the cause.

Mr. Addis now made two motions in this case; the first for the production of the papers, and the second for the payment of the money into court.

Mr. Follett, contra, did not object to the production of the papers, or to the payment of the money into court; but he insisted that the plaintiff had been guilty of vexation, in making this application by two separate motions, when one would have been sufficient. He therefore contended, that the plaintiff ought to bear the extra expenses, which had been occasioned by this vexatious mode of proceeding.

The MASTER OF THE ROLLS said, that to mark his disapprobation of this course of proceeding, he had inserted in the order to be made in this case a direction, that on taxation of the costs of the suit, the extra costs incurred in consequence of these two motions, should be paid by the plaintiff.

V.C. }
 Dec. 3. } **GLASCOTT v. GOVERNOR AND
 COMPANY OF THE COPPER
 MINERS OF ENGLAND.**

Discovery—Officers of Corporation—Injunction.

The rule, that in a suit against a corporation, an officer of the corporation may be made a defendant, for the purpose of obtaining a discovery of books and documents upon oath, applies whether the bill be for relief,

or for discovery merely; and the plaintiff may, upon the same rule, make several officers of the corporation defendants, for a like purpose.

A defendant at law is entitled to discovery in equity, not only to support an affirmative case, which he may set up in his defence, but also to sustain his defence negatively, by disproving facts, which the plaintiff at law must shew, in order to maintain his action.

On the coming in of the answer of a corporation, the common injunction obtained against them will be dissolved, notwithstanding the officers of the corporation, made defendants to the same bill to obtain discovery on oath, have not answered.

The bill stated, that the Governor and Company of the Copper Miners of England, in June 1839, applied to the plaintiffs to smelt copper ore for them, at their smelting works at Llanelly, and that a memorandum was then made and signed by the plaintiffs, and by the defendant, W. Short, the secretary of the company, whereby it was agreed that the plaintiffs should smelt for the company, at least 75.21 cwts. of copper ore per week, average 9 per cent. produce, and return the produce of the said ores, in good tough cake copper, to the company, or their order. That the produce as marked in the ticketing papers, should be taken as the produce of the ores; that all freights and dock dues should be paid by the plaintiffs, who were to reimburse themselves for the same, and for the smelting charges, by their agent's monthly drafts on the company. That for the security of the due return of the copper smelted, the plaintiffs should deposit with the company certain promissory notes, for sums amounting together to 2,969*l*. That the plaintiffs smelted the stipulated quantity of ore, and returned the produce in copper, until October 1839; and part of the ore thus smelted, was delivered to the plaintiffs by the company, and the rest purchased by the plaintiffs for the company at the copper ore sales. That in August 1839, the plaintiffs were directed by the company, in a letter from the secretary, to attend at a sale at Swansea, and purchase 300 tons of copper ore, at a certain price; and an agent of the plaintiffs attended accordingly, and purchased 292 tons; but the calcu-

lation of price being intricate, the same was bought at a price somewhat above the limit fixed by the company. That afterwards on the 13th of the same month, the following note or form of contract was sent to the plaintiffs:—"London, August 13, 1839.—No. 2337.—Bought for account of Messrs. Glascott, brothers, from the English Copper Company, thirty-four tons of tough cake copper, to be delivered at Llanelly, out of the produce of the 292 tons of ores, bought by the English Copper Company at Swansea, on the 7th instant, at the price which it will cost the sellers after payment for the ores and all charges for smelting, and to be paid for in cash without discount, half per cent. brokerage. Michael J. Mahony, sworn broker." That the plaintiffs immediately refused to recognize the contract expressed in the note, and so stated to the defendant Short, and also to the other defendants, C. De Vaux, J. Gunston, and S. Gregson, who said, that the same was unauthorized by the company, and not intended to be acted upon. That the plaintiffs smelted the whole of the ore, and delivered the produce to the company, who accepted the same. That in October 1839, the plaintiffs had a large stock of copper ores belonging to the company, and to other persons, which were necessarily intermixed; and they being then under some temporary embarrassment, the several owners of the copper ores were desirous of obtaining possession of the premises and the ores thereon. That the company and other of such owners, to effect this object, agreed to purchase the works for 15,000*l.*, subject to a right of repurchase at the end of two years: the purchasers agreeing to apportion the ores among themselves; and the works were delivered up to the purchasers in October 1839, together with all the ores and smelted copper. The plaintiffs alleged, that they thereby became discharged from the smelting agreement of June 1839. In May 1840, the company brought an action against the plaintiffs for the sum of 2,760*l.*, the price of thirty-four tons of copper under the note or contract of August 1839. The plaintiffs alleged, that no such contract had been made; that the thirty-four tons of copper never came to their hands; and that although the 292 tons

of ore were smelted, yet an equivalent in copper was delivered up in the manner mentioned; and the bill prayed a discovery of the said matters, and an injunction to restrain the action until answer. The company, which was a body corporate, and the chairman, deputy chairman, one of the directors, and the secretary, were made defendants.

The four last-mentioned defendants demurred, on the ground, first, that the rule by which the officers of a corporation might be made defendants to obtain discovery, applied to bills for relief, and not to bills for discovery merely;—secondly, that making so many members of a corporation defendants was an abuse of the rule, and if allowed, all the proprietors of an incorporated company might be made defendants;—thirdly, that the bill of discovery could be sustained only against the plaintiffs at law—*Irving v. Thompson* (1), *Fenton v. Hughes* (2); and, lastly, that the case stated by the bill was not such as would sustain any defence to the action at law, but would at the utmost only shew that the plaintiffs at law could not sustain their action; that it was the business of the plaintiffs at law to prove their case, and that the discovery to which the defendant was entitled, could only be of matters affirmatively discharging him, not of matters negatively evidencing the facts on which he relied, by shewing that the plaintiffs at law had no title to sue, and ought therefore to be nonsuited—*Bolton v. the Corporation of Liverpool* (3).

Mr. Jacob and Mr. Loftus Wigram, in support of the demurrer.

Mr. Richards and Mr. Heathfield, for the bill, cited—

Dummer v. the Corporation of Chippenham, 14 Ves. 252.

Le Texier v. Margravine of Anspach, 15 Ves. 164.

Moodalay v. Morton, 1 Bro. C.C. 469.

Wych v. Meal, 3 P. Wms. 310.

(1) 9 Sim. 17; s. c. 8 Law J. Rep. (N.S.) Chanc. 357.

(2) 7 Ves. 288.

(3) 3 Sim. 472; s. c. 1 Myl. & K. 92; 1 Law J. Rep. (N.S.) Chanc. 166.

Mayor, &c. of London v. Levy, 8 Ves. 398.

Lord Redesdale, Treatise, p. 153, (2nd and 3rd edit.)

Angell v. Angell, 1 Sim. & Stu. 83; s. c. 1 Law J. Rep. Chanc. 6.

Dec. 3.—The VICE CHANCELLOR.—The bill represents a variety of circumstances, many of which I do not see the use of stating, except so far as they may assist in making clear the contract, or rather the broker's note of 1839. The language of the note is such that there is nothing which enables the Court to guess at its meaning, unless it be the preliminary statement of the bill, as to the agreement, and what was done before and after it. It is represented that the Copper Mining Company have brought an action against the plaintiffs, in respect of the contract of August 1819: then it says, that the contract is fictitious, and that no such contract was ever entered into; and it represents, I think sufficiently, that the four demurring parties are officers of the company; and there is a statement that the defendants generally have books and papers relating to these matters in their possession. The plaintiffs at law may very possibly have evidence to support their case, which it may be necessary for the defendants to rebut by other evidence. The bill does not seek to force the defendants to admit that they have no case at law, but it seeks to make them produce documents and other evidence which they may offer in opposition to any evidence which is to be brought against the defendants at law; and this, I think, the plaintiffs on this bill are entitled to do. The question then is, whether such a bill can be sustained, as against these demurring parties; and, I think, there is plenty of authority to sustain it. In the 2nd edition of *Mitford*, p. 153, there is a passage identically word for word with a passage in the 4th. Lord Redesdale was a great observer of what was going on in this court; and there is the same passage on this subject in the second and subsequent editions of his *Treatise*. It may be perfectly true, that Sir J. Leach made the observation which is attributed to him in *Angell v. Angell*; yet I think there was sufficient

reason why the demurrer in that case should have been allowed. If that opinion is right, it would not be an authority against the other point involved in that case, that a bill will lie against a corporation and their agents for discovery only.

The language of Lord Redesdale, in both editions of his work, is in most general terms: "It has been usual, where a discovery of entries in the books of a corporation, or of any acts done by the corporation, has been necessary, to make their secretary or book-keeper, or other officer, a party." Now, if you may make an officer other than the secretary a party, which this language clearly imports, it seems to follow, that not only the secretary, but the governor or deputy governor, or any other person, may be made a party, on the allegation that he has books and papers in his possession, whereby the truth of the several matters would appear. I think I am actually bound by the authority I find; and, indeed, I have always considered this to be the law of the court.

Demurrer overruled.

Dec. 9.—The order *nisi* for dissolving the common injunction having been obtained on the coming in of the answer of the company, it was now moved to make the order absolute.

Mr. Loftus Wigram, for the motion, cited *Joseph v. Doubleday* (4).

Mr. Richards and *Mr. Heathfield*, *contra*, submitted, that the evidence which was most material to the plaintiff on the trial at law, and to obtain which the bill of discovery was filed, was that which would no doubt be elicited from the answer of the officers of the company; and that the injunction should be continued until the officers had answered, or the discovery would be useless.

The VICE CHANCELLOR said, it was a matter of course to dissolve the injunction against the company, when they had put in their answer.

Order absolute.

(4) 1 Ves. & Bea. 497.

L. C.
 Nov. 30, Dec. 2, 1839. } FAULKENER V. DANIEL.
 Nov. 10, 1840. }

*Receiver—Mortgagee—Tenant for Life
 —Charge—Keeping down Interest—Contingent Legacy.*

*A, being seised of an estate in fee simple, in Jamaica, subject to a mortgage in favour of B, devised the same to C for life, with remainder to his first and other sons, in tail male, with remainder, in default of such issue, to the right heirs of A: A then gave a legacy of 5,000*l.* to L, on the last contingency happening, payable out of the same estate. A, by the same will, created other charges on the estate, and also empowered C to charge the estate with certain portions for his daughters. C, by his will, devised the estate to his daughters for successive estates for life, with remainders to their first and other sons in tail, subject to the mortgage to B, who was in possession of the estate, and to other charges after a prior life estate to his wife. The personal representatives of L did not dispute that B was entitled to possession of the estate, if anything remained due to him on his mortgage. It was admitted by the personal representatives of L, that C had, out of the income of the estate, paid off part of the mortgage and of the charges created by the will of A, and had taken assignments of some of such charges to preserve a claim on the estate, in the event of his having issue male:—Held, that the tenant for life was entitled as against the devised estate, to stand in the place of the mortgagee for so much of the rents and profits as during his lifetime had been applied in reduction of the principal sum due on the mortgage; and that the personal representatives of L were not entitled to have a receiver appointed over the estate, as against B, the assignee of C, of the charges paid off by him; and that the personal representatives of L, having failed to shew that there was not vested in B, the mortgagee, a title to charges on the estate prior to their claim, and exceeding in amount the amount of compensation money standing in the name of the Accountant General, there was no ground for ordering the same to be transferred into the cause.*

NEW SERIES, X.—CHANC.

In this case the bill was filed by Sir A. B. Faulkener and Ann his wife, the latter being the administratrix of Dame Jannet Grant, deceased, formerly Jannet M'Leod, spinster, against Thomas Daniel and John Daniel, Jane M'Leod, James M'Leod, and other persons claiming legacies or annuities under the will of John M'Leod, dated the 13th of January 1775. By that will, the testator devised his estate called "Colbecks," in Jamaica, to trustees, upon trust, for such child as he might have by his then wife, at the time of his death, or born in due time afterwards; and in default of such issue, in trust for his nephew, John M'Leod, the eldest son of Donald M'Leod, during his life, with remainder to the first and other sons of the said John M'Leod, in tail male, with similar limitations to the said Donald M'Leod, the testator's brother, and his second and other sons, with remainder in trust, for the testator's own right heirs for ever. The will then bequeathed to the said Jannet M'Leod, in manner following—"And upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of 5,000*l.* to my niece, Jannet M'Leod, over and above the sums of money hereinbefore left and bequeathed to her." By the will, power was given to J. M'Leod to charge the estates in favour of his daughters, and he accordingly created such charges by will. The bill prayed an account of the receipts and payments of the defendants Messrs. Daniel, as mortgagees in possession of the Colbecks estate, devised by the will, and payment of the legacy of 5,000*l.*, after satisfaction of what, if anything, remained due to those parties, and also for the appointment of a receiver and consignee of the proceeds of the said estate, and for a transfer into court of a sum of money awarded by the commissioners acting under the Slave Compensation Act, as due in respect of the Colbecks estate, and standing in the name of the Accountant General, subject to the present suit.

The material allegations of the bill having been in substance stated by his Lordship in his judgment, and his Lord-

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ship having decided the case on those allegations, without adverting to any of the answers, it has been deemed unnecessary to refer to them here.

Mr. Wigram and Mr. Reynolds now moved for the appointment of a receiver and consignee of the rents, profits, and proceeds of the Colbecks estate, and for the payment into court of the compensation money, standing in the name of the Accountant General, and cited—

Toulmin v. Steere, 3 Mer. 200.

Bertie v. Abingdon, *ibid.* 560.

Astley v. Miller, 1 Sim. 298.

Ellicombe v. Gompertz, 3 Myl. & Cr. 127.

Barry v. Wright, 5 Russ. 142.

Mr. Knight Bruce and Mr. Teed, *contra*, cited—

Wyndham v. Lord Egremont, Amb. 753.

Lord Buckingham v. Drury, 3 Bro. P.C. 497.

Forbes v. Moffat, 18 Ves. 384.

Drinkwater v. Combe, 2 Sim. & Stu. 340; s. c. 3 Law J. Rep. Chanc. 178.

Wigsell v. Wigsell, 2 Sim. & Stu. 364; s. c. 4 Law J. Rep. Chanc. 84.

The LORD CHANCELLOR.—The facts as stated by the plaintiffs' bill, as far as they apply to the question now before me, are shortly these:—John M'Leod, the testator, in 1765, mortgaged the estate called Colbecks for a large sum of money; and, by his will, in 1775, charged his debts and legacies and annuities on his real estate, and gave the residue of his estate, real and personal, to trustees, in trust for his nephew, John M'Leod, for life, remainder to his first and other sons in tail, remainder to his own right heirs, and on that contingency happening and failure of issue of his brother, and his estate going to his right heirs more remote, he charged and made liable his estate to the payment of 5,000*l.* to his niece Jannet, and he empowered his nephew to charge the estate with certain portions for his daughters. The testator died in 1775, leaving his brother his heir, and he died in 1786, leaving the devisee, John M'Leod, his heir, who died in 1822, without issue male, but leaving daughters, to whom he, by will, devised the estate for successive estates for life, with remainder

to their first and other sons in tail, subject to the mortgage of the year 1765, and other charges after a prior life estate to his wife. These daughters of John M'Leod were the co-heiresses of the testator, on the death of their father without issue male; and assuming, as the bill does, that the 5,000*l.* became payable on that event, and that the plaintiffs are entitled to it, the question is, whether they are in respect of such right entitled to have a receiver over the Colbecks estate, and the compensation money for the slaves paid into court; which cannot be the case if the parties in possession are entitled for themselves or others to the mortgage of 1765, or to such part of it, if any, as remains unpaid, or to any charges on the estate prior to the plaintiffs'. This the plaintiffs do not dispute; but to meet this objection they contend, that the mortgage and other charges are as against their claims to be considered as satisfied, and for this purpose first allege that all the rents of the estate ought to have been applied in discharging the mortgage and other charges; and that if they had been so applied, the mortgage and charges would have been paid.

The bill then alleges that John M'Leod, the tenant for life, had, out of the income of the estate, paid or directed to be paid part of the mortgage and of the other charges, and had taken assignments of some of such charges to preserve a claim on the estate, in the event of his having issue male; and contends that as against the plaintiffs' demand he was not entitled to keep alive those charges on the estate, and goes on to admit, or at least not to dispute, that at the death of John M'Leod, in 1822, about 4,000*l.* of the mortgage remained unpaid. Now, if the plaintiffs' equity, as asserted, against John M'Leod, were well founded, and if he could not, from the nature of his interest in the estate, keep alive, as against the mortgagees, the charges which were made in his lifetime, how can the plaintiffs, on that or any principle, make out that this 4,000*l.*, due at his death, has been discharged? They say by their bill that the mortgagees who were in possession received sufficient to discharge it. Supposing that to be so, and that the income of the tenants for life (for

from that time there had been constantly tenancies for life on the estate) had been applied in discharging what remained due on the mortgage, such tenants for life were clearly not bound to do more than keep down the interest on the mortgage debt, and are consequently entitled, as against the estate, to stand in the place of the mortgagees for so much of the rents and profits as has been applied in reduction of the principal. During the whole of this term the parties in possession were not only entitled to what remained due of the mortgage of 1765, but were entitled to other charges created by John M'Leod; and the bill complains that they applied the rents and profits to keep down the interest on those charges, instead of discharging the principal of the old mortgage. This was the proper course, as between the tenant for life and the owners of the inheritance; and if so, the plaintiffs have failed, in their own way of stating the case, in shewing that the mortgage and charges prior to theirs had been discharged. This is a sufficient answer to the application for a receiver. I therefore avoid discussing the equity asserted against John M'Leod, because it may unnecessarily anticipate points which the plaintiffs may be desirous of raising at the hearing. I may, however, observe, that the plaintiffs are seeking to have the point decided against the personal estate of John M'Leod, without having any personal representative before the Court.

Being of opinion that the plaintiffs have failed in shewing on the pleadings that there is not vested in the defendant a title to charges on the estate prior to their claim, and exceeding in amount the compensation money standing in the name of the Accountant General, I am of opinion that no case is made for transferring into the cause the amount of such compensation money, now standing in the name of the Accountant General, and awaiting the award of the commissioners. I have thought it more satisfactory to rest my decision on the case as made by the plaintiffs, and have therefore not adverted to the case made by the answer, but which would, if necessary to be resorted to, have furnished other answers to this application. The motion must be refused, with costs.

V.C. }
Dec. 3. } HORNCastle v. CHARLESWORTH.

Partition—Copyholds.

There is no jurisdiction in equity to decree a partition of copyhold lands, either where the bill relates to lands of that tenure only, or to copyholds and freeholds intermixed.

The plaintiffs and the defendants were seised, to them and their heirs, in undivided shares, or entitled according to the custom of the manor of Wakefield, to certain closes of land situated at Ribblesdon, in the parish of Kirkburton, in the county of York, within the said manor; and they had been admitted tenants of their undivided shares. The plaintiffs being desirous of having their shares allotted in severalty, filed their bill for a partition. The defendants demurred for want of equity.

Mr. K. Parker and Mr. Hodgson, for the demurrers.—By the common law, joint tenants and tenants in common were not compellable to make partition. This was remedied by 31 Hen. 8. c. 1. The 32 Hen. 8. c. 32, extended the remedy to joint tenants and tenants in common for life or years. These acts did not extend to copyholds, because there cannot be a partition of them, without licence of the lord, who might otherwise be prejudiced by the alteration—*Co. Litt.* 187, *a*; and the statutes also provide, that partition shall be effected by writ, and copyholds are not impleadable at the common law—6 *Vin. Abr.* 171, tit. 'Copyhold,' (O, *d.*) pl. 19.

Oakely v. Smith, 1 Eden, 261.

Burrell v. Dodd, 3 Bos. & Pul. 378.

Scott v. Fawcett, 1 Dick. 299.

1 *Maddock Ch. Pr.* 248, 2nd ed.; 332, 3rd ed.

Hall v. Freeth, M.R., 10th of March 1819, *ibid.* note.

Whitechurch v. Holworthy, V.C., Dec. 1821, *ibid.* note.

Mr. Jacob and Mr. Elmsley, for the bill.—By the 3 & 4 Will. 4. c. 27. s. 36, writs of partition are abolished.

[The VICE CHANCELLOR.—In that act there is no reference to equitable partition. I rather think it was intended to have it in equity only.]

2 *Watkins on Copyholds*, p. 153.

Allnutt on Partition, p. 94.

Dodson v. Dodson, Rolls, 1795, *ibid.*

Gaskell v. Gaskell, 6 Sim. 643.

The jurisdiction of this Court exists quite independently of the common or statute law. This Court, in executing a partition, can direct money to be paid for owelty of partition. The judgment on the writ of partition had a legal operation; and therefore to give it effect as to copyhold, would be a plain interference with the lord's right. This Court also deals with complicated interests in a manner which cannot be done at law.

Baring v. Nash, 1 Ves. & Bea. 555.

Swan v. Swan, 8 Price, 518.

There is no more interference with the right of the lord, than in any other case in this court, in which copyholds are dealt with, or than exists in every case where a copyholder aliens a part of his tenement. He surrenders, and the lord is bound to admit the new tenant. If there were any special right in the lord to refuse to do this, that might be an objection.

THE VICE CHANCELLOR.—I have always considered this question settled. I very well remember a decision of Sir W. Grant on the point, in 1811; since which time, I have never met with a person who had a doubt about it. There had been a floating opinion that the thing could be done, but it soon subsided. Where one party had freeholds and another copyholds, there may be a partition in one sense, by giving the whole of the copyholds to one, and the freeholds, and, if necessary, money for equality of partition, to the other (1). Since the decision by Sir W. Grant, to which I have referred, I have never heard it as much as hinted that this Court had jurisdiction to make a partition of copyholds merely. There is nothing gained by making observations—very ingenious, I confess,—as to the mode in which this Court makes a partition. This Court has never extended its jurisdiction to any new subject, but

when dealing with an old subject, has dealt with it in its own way. If this Court, on a bill filed, found persons variously entitled in undivided shares to partial interests, as some in fee simple and some for life or lesser estates, the Court could be sure that no injury was done, because the conveyances would be so directed, that the divided shares would be conveyed to the same uses as the undivided shares were previously held. The jurisdiction of this Court is, in effect, an improvement on the right which existed at law; but this Court has never assumed a jurisdiction over copyholds.

Demurrers allowed.

M.R. }
Nov. 9, 10. } BALLS v. MARGRAVE.

Pleading—Demurrer.

The devisee of a lessor of copyholds brought an action of covenant against the lessees, to recover arrears of rent, and filed a bill of discovery in aid of the action. The bill alleged, that at the time of granting the lease, the lessor was "seised or otherwise well entitled":—Held, that the title of the lessor to the legal estate was not alleged with sufficient clearness, and a demurrer to the bill was allowed.

The bill stated, that Thomas Cheek was, for five years and upwards previous to, and at the date of the indenture of lease therein mentioned, *seised or otherwise well entitled*, to him and his heirs, for an estate of inheritance, of or to the messuages or tenements and hereditaments therein mentioned; and that being so seised or entitled, he did, by an indenture of lease, of the 31st of January 1794, demise these hereditaments unto Joseph Rowland, from Christmas 1793, for a term of ninety-nine years, at the yearly rent of 26*l.* And by the said indenture of lease, the said Joseph Rowland covenanted that he, his executors, administrators, and assigns, or some or one of them, would well and truly pay, or cause to be paid, the said yearly rent of 26*l.* thereinbefore reserved, at the days or times, and in manner thereinbefore appointed for payment thereof: that Thomas

(1) Vide *Dillon v. Coppin*, Rolls, June 28, 1834, 3 Law J. Rep. (N.S.) Chanc. 201, where on a bill for partition of freeholds and copyholds, the Master of the Rolls (Sir J. Leach) ordered the whole of the copyholds to be allotted to one, refusing to sever them.

Cheek, by his will, bearing date the 30th of July 1791, devised all his estates, including the hereditaments comprised in the lease, which, being copyhold of the manor of Stepney, he had previously surrendered to the uses of his will, unto his grandchildren between them.

The bill then stated, that Cheek died in 1794: that the grandchildren were duly admitted: that one of the grandchildren purchased the shares of his brothers and sisters, which shares were duly surrendered to him; and that he afterward surrendered them to the uses of his will, and devised them to the plaintiffs, who had also been admitted: that Rowland, the lessee, died in 1808, having bequeathed his leasehold interest in these hereditaments to his daughter, who, in 1827, assigned them to Thomas Margrave; and that the defendant was Margrave's executor.

The bill stated, that large arrears of the rent of 26*l.* reserved by the indenture of lease were due to the plaintiffs from the defendant; and that the plaintiffs had commenced an action of covenant against the defendant in the Exchequer of Pleas, for the recovery of the arrears, but that they were unable to proceed with the action without the production of the indenture of lease, which was in the possession of the defendant.

The bill prayed a discovery of the matters therein mentioned, and for the production of the indenture of lease at the trial of the action.

To this bill the defendant put in a demurrer, on the ground, that it was not, by the bill, shewn, or with any sufficient certainty or precision alleged or averred, that the said Thomas Cheek was, at the time of his granting or purporting to grant the indenture of lease, seised to him and his heirs for an estate of inheritance of or to the said messuages or tenements and hereditaments; and it therefore did not with any certainty appear that any covenant on the part of the lessee contained in the said indenture of lease would run with the land, so as, under the circumstances stated in the said bill, to enable the plaintiffs to sue the defendant on such covenant; but any such covenant would, on the contrary, be a covenant in gross.

Mr. Kindersley and *Mr. Evans*, in support of the demurrer.—The title of the plaintiff must appear clearly on the bill; and if it is loosely stated, the loose statements of the bill must receive such construction as is most against the party making them—*Vernon v. Vernon* (1). The allegation that the lessor was "seised or otherwise well entitled," does not amount to a clear statement that he had the legal estate. In *Baring v. Nash* (2), such an expression was held sufficient, because it referred to the title of the defendant, the precise nature of whose interest might not be known to the plaintiff.

Right dem. Jefferys v. Bucknell, 2 B. & Ad. 279; s. c. 9 Law J. Rep. K.B. 304.

Whitton v. Peacock, 2 Bing. N.C. 411; s. c. 5 Law J. Rep. (N.S.) C.P. 124.

1 *Saund. Rep. by Williams*, p. 233, a. note.

Mr. Pemberton and *Mr. Taylor*, contra.—It is not enough, to support a demurrer, to shew that circumstances may possibly exist which would defeat a plaintiff's claim. The statement in the bill is, that the lessor was either legally or equitably entitled. It is also stated, that he had surrendered these hereditaments to the uses of his will—that his devisees were admitted—that several other surrenders and admissions were also made. That might possibly take place without the parties having the legal estate, but it is highly improbable; and unless there is some ground for believing that all these proceedings were irregular, the statements of the bill must be taken as a clear statement of a legal seisin.

Mr. Kindersley replied.

Nov. 10.—The MASTER OF THE ROLLS, after reading through the allegations of the bill, said, that the statement respecting the seisin of the lessor was open to the objection which had been raised; and he, therefore, allowed the demurrer without costs, and gave leave to amend.

(1) 2 Myl. & Cr. 171.

(2) 1 Ves. & Bea. 551.

V.C.
Nov. 14, 16. } MORRICE v. LANGHAM.

Devise—Contingent Remainders—Shifting Use—Intermediate Rents and Profits—Construction of Residuary Devise.

Appointment of estates to trustees to the use of A for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A in tail male, remainder to the use of the right heirs of B, for ever, and if the tenant for life or in tail in possession, should become entitled to certain other estates, the former estates to go over as if such tenant for life was dead, or tenant in tail dead without issue. In the life of A, but before he had any son, the event happened on which the first estates were to go over:—Held, that the right heirs of B could not take the rents and profits of the estates during the life, or until the birth of a son of A, inasmuch as there was the prior estate of the trustees to preserve contingent remainders, who could not be construed to be trustees of such rents and profits for the benefit of the persons entitled under the remote limitation to the right heirs of B.

That such intermediate rents and profits did not pass by the devise of "all the residue of my real and personal estate," in the will of the person having the power of appointment; although in other parts of the will he had used the word "my," in reference to estates subject to the power.

That though the legal estate was vested in the trustees by the appointment, yet in default of appointment of the beneficial interest, the Court would send a case for the decision of a court of law, on the question of the effect of the shifting clause in the prior limitations, upon the application of either of the parties claiming under such limitation.

By an indenture, of April 1804, and by a fine and recovery, certain hereditaments were limited to such uses as F. Tutte should by deed or will appoint, and in default of appointment to the use of F. Tutte in tail, with remainder to Sir James Langham, described as the second son of the late Sir James the elder, for life, with remainder to the use of trustees during the life of the said Sir James Langham to preserve contingent remainders, with remain-

ders to the first and other sons of the said Sir James Langham, in tail male, with remainder to L. Christie for life, with divers remainders over; and there was in the indenture the proviso—"That in case the said Sir James Langham, or any issue male of his body, should become entitled to the possession or to the receipt of the rents of the family estates of the said Sir James the elder, deceased, to the amount of 1,000*l.* a year, then and in every such case the use, limitation, and estate thereinbefore limited, in the hereditaments comprised in the said indenture, to be for the benefit of him or them who should so become entitled as aforesaid, and to or for the benefit of the issue male of such person or persons so becoming entitled as aforesaid, should cease; and then and in every such case, all and singular the said hereditaments and premises should immediately thereupon from time to time divest out of the person or persons so becoming entitled, and should go over in the same manner as if such person or persons so becoming entitled were actually dead without issue male. F. Tutte, by his will, appointed that, subject to a certain annuity, and also to a sum in gross of 12,000*l.*, which he directed to be raised, all the premises comprised in the said indenture should be held by the plaintiffs, F. Morrice, A. Wainwright, and A. H. Strong, and he did thereby appoint the same accordingly to the use of James Hay Langham, the eldest son of the said Sir James Langham and his assigns for life, with remainder to trustees and their heirs, during the life of the said James Hay Langham, in trust, to preserve contingent remainders, with remainder to his first and other sons successively in tail male, with remainder to the use of the right heirs of Herbert Hay for ever. And the will contained the proviso, that in case the person who, by virtue of the above limitations, should be tenant for life in possession of the premises comprised in the said indenture, or any part thereof, should, at the same time become entitled to the family estates of the said Sir James Langham, then that the estate and interest thereby limited to such tenant for life in the said premises should determine; and it was also provided, that each person,

who should become tenant in tail under the said will, and should become entitled to the Langham estates, should, in like manner, be deprived of all interest in the said premises; and that in either of such cases the said premises should immediately thereupon go over to the person next in remainder, under the limitations last aforesaid, in the same manner as the person next in remainder would take, if in the case of a tenant for life he were dead, and in the case of tenant in tail dead without issue. And the said testator devised his said copyhold estates to the same uses, and upon the same trusts, as would most nearly correspond with those on which his said freehold premises had been so before appointed and limited; and the testator gave, devised, and bequeathed all the rest and residue of his goods and chattels, and real and personal estate of every nature and kind unto the said F. Morrice, A. Wainwright, and A. H. Strong equally. In another part of the will, in directing the manner in which the 12,000*l.* should be raised, the testator had used the words "*my manors, farms, and lands, called, &c.*" with reference to parts of the said estates over which he had a power of appointment only. Sir J. Langham, the father of the defendant Sir J. H. Langham, in May 1812, became entitled, under the will of his brother, to an estate for life, in or to the rents and profits of the family estates of Sir James the elder, to an amount exceeding 1,000*l.* a year. F. Tutte died in 1824, and thereupon J. H. Langham (now Sir J. H. Langham), as first tenant for life, entered into possession of the estates comprised in the said indenture and appointment; and upon the death of his father in April 1833, he became entitled to the Langham family estates, whereupon, under the said proviso, his interest in the appointed estates ceased and determined. At the time when the said Sir J. Hay Langham became entitled to the Langham family estates, he had not, nor had he subsequently any issue. The question, therefore, arose as to the disposition of the rents and profits of the estates comprised in the said indenture and appointment, from the time of the cesser of Sir J. H. Langham's interest therein, during his life, or until he should have a son.

The plaintiff claimed under the residuary clause in the will of F. Tutte to be entitled, together with the representatives of the said A. H. Strong, deceased, as tenants in common, in equal third parts, to such rents and profits during the said interval,—contending, that as the testator had no other freehold estate whatever, the residuary devise to them and A. H. Strong of all the rest and residue of the testator's real and personal estate included and passed all such interest in the real estate comprised in the indenture of 1804, and also in the said copyhold estates, as were not otherwise disposed of by the appointment. The defendant W. A. Sanford claimed to be entitled to the same rents and profits, by virtue of the appointment in the will of 1820, as the heir-at-law of Herbert Hay. The defendant Herbert Langham claimed to be entitled to the same as in default of appointment, as the next tenant in tail, under the limitations of the indenture of 1804, insisting that the cesser of the interest of Sir J. Langham in 1812, destroyed only his life estate; and that the descent of the family estates upon Sir J. H. Langham, in 1833, terminated his estate tail only, and that the next estate tail thereupon vested. L. Christie claimed also, under the indenture of 1804, as in default of appointment, but insisted that the effect of the cesser of the estate of Sir J. Langham, in 1812, before the remainder to his issue male could take effect, was to destroy the estate limited to such issue male, and let in the next in remainder.

The cause was heard in March 1839, when it was referred to the Master to make various inquiries; and upon his report as to the facts, it came on for further directions.

Mr. Wigram and Mr. Sidebottom, for the plaintiffs.

Mr. Jacob and Mr. James Parker, for L. Christie.

Mr. K. Bruce and Mr. Romilly, for Herbert Langham.

Mr. Hodgson and Mr. James Russell, for the heirs of Herbert Hay.

Mr. Swanston and Mr. Bacon, for the heir-at-law of F. Tutte.

Mr. Law, for the executors of Strong.

The authorities cited were,—

Hopkins v. Hopkins, 1 Atk. 581.

Doe d. Heneage v. Heneage, 4 Term Rep. 13.

Carr v. the Earl of Errol, 6 East, 58.

Stanley v. Stanley, 16 Ves. 419.

Standen v. Standen, 2 Ves. jun. 589.

Carrick v. Errington, 2 P. Wms. 261.

Fearne Conting. Rem. 255, (9th ed.)

Churchill v. Dibben, 9 Sim. 447.

Walker v. Mackie, 4 Russ. 76.

Hughes v. Turner, 3 Myl. & K. 666 ;

s. c. 4 Law J. Rep. (n.s.) Chanc. 141.

Napier v. Napier, 1 Sim. 28 ; s. c. 5

Law J. Rep. Chanc. 65.

Cowes v. Hackward, 18 Ves. 168.

Nov. 16.—The VICE CHANCELLOR.—In this case there are four questions raised. The first is that which Mr. Wigram has argued for the plaintiffs, which depends entirely upon the construction of Mr. Tutte's will, as compared with the nature of the estate, which, it is contended, was the subject of devise, I mean with respect to the limitations that had been made of it by the deed of 1804. And, supposing the claim of the plaintiffs is out of the way, then there are the three questions that have been raised respectively on behalf of the gentleman who represents the right heir of H. Hay, on behalf of Mr. Langham Christie, and of Mr. Herbert Langham. As to some of these questions, it really appears to me that there is no doubt about them.

First, with respect to the claim of the plaintiffs. The estate in question was, by deed and fine and recovery, settled to such uses as Mr. Tutte should appoint generally, and in default of appointment to him in tail, and then with remainders over ; but as I understand it, there was no remainder in fee to him, except in so far as he might be comprehended in the ultimate limitation in remainder to the right heirs of the settlor. Then, that being so, Mr. Tutte makes his will in the year 1820, in this form:—he says, "First, I desire that all my just debts, funeral and testamentary expenses may be first paid and satisfied ;" and then he says, "Secondly, in pursuance of the power and authority reserved to me by the indenture," which he describes, "I do hereby direct, limit, or appoint all that the manors,"—and he describes the parcels

at considerable length—"to the use and intent" that Louisa Wainwright may receive an annuity, with remainder to the use of three persons, their heirs and assigns, on trust, to raise a sum of 12,000*l.* in a given manner ; and then, subject thereto, to the use of James Hay Langham for his life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail, and then with remainder to the right heirs of Herbert Hay. Then there are certain provisoes, upon which comment will be necessary presently ; and after the provisoes there comes a devise :—"I give and devise all and every my copyhold and customary messuages, cottages, and hereditaments, with their and every of their rights, members, and appurtenances, unto the said A. H. Strong, his heirs and assigns, according to the custom of the several manors whereof such copyhold or customary hereditaments are holden, nevertheless upon such trusts, and with, under, and subject to such powers, provisoes, and limitations, and to and for such intents and purposes as will nearest and best correspond with the uses and trusts hereinbefore limited, of and concerning my said manors and freehold hereditaments hereinbefore directed, appointed, and limited." He then disposes of his books, and then follows the residuary clause—"And as to all the rest and residue of my goods and chattels, and real and personal estate of every nature and kind, including in the latter the aforesaid sum of 12,000*l.*, or such part thereof as I shall not give and bequeath by some codicil or codicils to this my will, or some paper writing purporting to be a codicil, I give and bequeath the same unto the said" three persons ; and then he divides it between them in three parts. Now, it is said, that inasmuch as in certain events that have happened, a certain portion of interest in the estate, which was the subject of appointment, has not gone according to the appointment, that therefore it has passed by the residuary devise, and that the expression, "the rest and residue of my goods and chattels, and real and personal estate," extends to that. It is perfectly plain, I think, that so far as there was a trust declared by the testator concerning the fee of the copyholds which were de-

vised to trustees upon such trusts as would most nearly correspond with the freehold estate, that that being his,—the testator's estate, in the ordinary sense of the word, so far as the trusts which, in substance and in event, were declared by the will, did not exhaust the whole beneficial interest, the surplus of the beneficial interest would pass by the residuary devise.

Then, it is said, that the surplus of the freehold estate has also passed by the residuary devise. I must say, that upon reading the will, and attending to the argument, it is quite clear to me that it did not; because the case of *Standen v. Standen*, and cases of that kind, appear to me to have nothing whatever to do with the matter. The question is, whether, on the face of the will, it appears that there was an intention in the testator to pass by devise any portion of the estate which was subject to appointment. Now, it appears to me to be quite impossible to look at this will without seeing,—and that was the reason I read so much of it as I have done at length,—without seeing that the testator has divided his will into parts, and that the second part is made wholly and exclusively to be applicable to the subject of the freehold estates over which he had exercised the power. He begins the clause by saying,—"And secondly, in pursuance of the power," and he confines himself entirely to the execution of the power, and finally ceases to notice the estate which was subject to the power when he comes to the clause in the direction of the trusts of the copyholds, wherein he refers to "my said manors and freehold hereditaments hereinbefore directed, appointed, and limited;" and it was quite plain, on the face of the will, that he had completely exhausted the power, and appointed the whole fee simple.

But then it is said, that he has referred to these estates by the term "my," in the residuary clause, because in the course of declaring the trusts concerning the fee of the freehold hereditaments, which were appointed to the trustees, he has used the expression, "my manors, farms, and lands, called the Goate." The answer to that is, that there he is only describing the particular order in which the sum of 12,000*l.*,

directed to be levied, shall be raised; first, a certain portion of the estate is to be applied, and then another part; and then, in speaking of the parts, he speaks of them simply as "my manors, farms, and lands, called the Goate, and my farm called"—specifying the name. It is quite plain to me, that by this expression "my," he did not thereby mean to appropriate to himself in fee simple that thing, the fee simple whereof he had before exhausted by the very appointment which he had exercised over the freeholds; and it really appears to me as a matter of construction of the will, that though the surplus of the copyholds would pass, because it was the testator's, strictly speaking, the surplus interest in the freeholds, which eventually became unappointed, cannot pass by this residuary devise.

If, then, the claim of the plaintiff is out of the question, I must consider the three other conflicting claims. Now, the claim which has been made on the part of the heir of Herbert Hay, is a claim which I can dispose of, because it is merely an equitable claim; the effect of the appointment being to vest the whole legal estate in remainder in the trustees, and therefore any interest which the heir of Herbert Hay can claim is purely equitable. Then how does that stand? In some respects it stands in common with the claims of the other claimants; but I have always understood the rule to be, that whether you speak of the residue of a fee simple estate, which is vested in a testator, and which is not wholly devised, or whether you speak of an estate which is subject to limitations, liable to be defeated by a general power of appointment, if, in the one case, the testator does not devise the whole, whatever is not devised remains in him; and so in the other case, where the estate is subject to a set of limitations, only preceded by a general power of appointment, whatever is not exhausted by the exercise of the power, remains subject to the limitations.

Then observe how the matter actually stood at the time of the testator's death.

By the deed of 1804, the limitations were (putting now the testator out of consideration,) to Sir C. Langham, for life,

with remainder to his first and other sons, with remainder to Langham Christie for life, and then with remainder over. Sir James Langham entered into possession of the Cottesbrook estate in the year 1812; and the parties all agree in this, that his estate would have then ceased. The testator himself died in 1824, and afterwards, when, in 1833, Sir James Langham died, Sir James Hay Langham, his son, was the person on whom the Cottesbrook estate devolved. Now, if the appointment had not been made, Sir James Hay Langham would have been tenant in tail of the Cottesbrook estate, under the limitations in the deed of 1804, but under the will of 1820, by virtue of the appointment, he was made tenant for life; and the proviso in the will of the testator was, that if any person who should be tenant for life, in possession of the manors and hereditaments, or of any part thereof which were devised by the will, should at the same time become entitled to the settled estates of Sir James Langham, so as to be in the actual receipt thereof, then the rents and interest therein before limited to every such tenant for life, should cease and determine. That was a proviso respecting the tenant for life; and then he speaks of the case of the tenant in tail, and says, "In either of the cases last before mentioned, the said manors, messuages, lands, tenements, hereditaments, and premises hereby directed, limited, and appointed as aforesaid, shall immediately thereupon go over to the person next in remainder, under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same by virtue of this my will, if the person so becoming entitled to the said estates of the said Sir James Langham, being tenant for life was dead, or being tenant in tail was dead without issue male." There seems to be no doubt whatever, on the effect of this will that so far as the will operated immediately upon Sir James Hay Langham coming into possession of the settled estate, his interest under the will would cease, and that in fact has raised the question.

It is to be observed, that under the deed of 1804, the clause was—[His Honour read the proviso].—On the part of the heirs of Herbert Hay, under the will, it is

insisted that he is entitled, and as I understand it, the argument for him is this, that the effect of the limitation is to destroy the life estate of James Hay Langham, to preserve the estate of the trustees to preserve contingent remainders, and nevertheless to give to the person who would take next in remainder, provided there was no issue of James Hay Langham, those rents and profits which, on the face of the trust, vested in the trustees to preserve contingent remainders, were to be for the benefit of James Hay Langham, which, it appears to me, would, in the first place, have the effect of making the heirs of Herbert Hay take immediately as the next person in remainder, notwithstanding the estate in trustees to preserve contingent remainders for the benefit of the first and other sons of James Hay Langham; and, moreover, which I take to be contrary to law, to involve this sort of contradiction,—although the trustees were only to take the rents and profits for the benefit of James Hay Langham, yet they are to hold them for the benefit of persons for whom they are in no sense trustees, any otherwise than as they might be trustees in the first instance to preserve the estate limited contingently to the first and other sons of James Hay Langham, and so, if it were necessary, to preserve the estate to the right heirs of Herbert Hay, but in no other manner whatever. It appears to me, it is quite impossible to argue the case on behalf of the heirs of Herbert Hay without running into a manifest inconsistency, and without in effect contradicting the principle of *Hopkins v. Hopkins*, and other cases of that kind, which are unquestionable. It appears to me, that the real effect of *Stanley v. Stanley*, *Heneage v. Heneage*, and *Carr v. Lord Errol*, is this, that the Courts are bound to construe the words of cessor, as near as they possibly can, in their simple and ordinary sense; and it does not appear to me that there is any mode whatever of construing these words of cessor in the will of Mr. Tutte, which can have the effect of giving any interest to the right heirs of Herbert Hay.

The only question would, therefore, be this, whether under the limitations in the deed of 1804, the person who is entitled

to take is Mr. Herbert Langham or Mr. Langham Christie; and with respect to that, I certainly think that the point itself is reasonably clear. If the parties desire it, I will state my opinion, leaving them then to take the opinion of a court of law; or if the parties rather prefer it, I will abstain from giving any opinion, and send the question to a court of law.

[The counsel for Mr. Langham Christie submitted, that the question was an equitable one, the object being to determine the beneficial interest in property which had become legally vested in trustees; and that it was not the habit of the Court to send a question for the decision of a court of law, unless the assistance of the court of law was needed.—The counsel for Mr. Herbert Langham submitted, that but for the equitable interest in fee created by the will, either party could bring an ejectment; and there was no reason for depriving the parties of their right to a legal adjudication.]

The VICE CHANCELLOR.—It is perfectly true, that the question arises out of an equitable interest, and that the property itself, which is the subject of question, has become equitable. The right, nevertheless, appears to me to depend upon the true construction of the shifting clause in the deed of 1804; and I think, notwithstanding a Judge may have a tolerably strong opinion upon a legal point, if a party insists on the question being sent to a court of law, it is the habit of this Court to send it to a court of law. This is a legal right; and, therefore, though I myself have very little doubt upon the construction of the instrument, yet if Mr. Knight Bruce does press for a case, I do not see how I can refuse it.

[The Court declared, that the plaintiffs and the representatives of Strong were entitled to the rents and profits of the copyholds during the life of Sir J. H. Langham, or until the birth of a son; and that the rents and profits of the freehold during the same time were unappointed and undisposed of by the will.]

V.C.
Nov. 6, 7, 9, 21. } WARDE v. FIRMIN.

Power — Appointment — Mistake — Hotchpot Clause.

Parties having a power of appointment of certain funds amongst children, and no power of appointment over other funds, to which the same children were entitled in equal shares, executed several instruments, by mistake assuming to appoint both funds:—Held, that notwithstanding the mistake, all the appointments were valid and operative, as to the funds expressed in them that were subject to the power; but that the effect of the hotchpot clauses contained in the instruments of appointment, was to exclude the appointees respectively, from the whole of the benefits thereby intended to be given to them, unless they gave up the whole of the shares to which they were respectively entitled in the fund not subject to the power.

P. Firmin, by a settlement in 1793, on his marriage, covenanted to transfer certain sums of bank and other stock, the property of his intended wife, then a minor, together with so much as would make up 400*l.* a year, to trustees, for him the said P. Firmin and his wife, during their lives; and after the decease of the survivor, in trust to transfer the said trust monies, and to pay the interest thereof, unto and among the children of the marriage, as the said P. Firmin and his wife, or the survivor, should appoint, and in default of appointment unto all and every the children of the marriage which being sons should attain twenty-one, and being daughters should attain that age or be married; and P. Firmin thereby also covenanted to settle so much stock as would produce another annuity of 400*l.*, upon trust to pay thereout an annuity of 200*l.* to his wife for her life, and as to the residue in trust for the children of the marriage, which being sons should attain twenty-one, and being daughters should attain that age or be married. And as to so much of the monies as should be necessary to answer and pay the said annuity of 200*l.*, in trust, after the decease of the wife, in such manner and subject to such powers of appointment, as were thereinbefore expressed concerning the fortune of the wife. There was in the same settlement a power for the

trustees to alter or vary the mode of investment of the trust funds. The stock, belonging to the wife, was accordingly transferred to the trustees, together with 184*l.* 14*s.* 10*d.*, to make up the sum necessary to produce the annuity; and, subsequently, before the year 1821, during the joint lives of the husband and wife, P. Firmin purchased and transferred to the trustees 13,333*l.* 6*s.* 8*d.* consols, to produce the other yearly sum of 400*l.*

The children of the marriage, who attained vested interests in the trust monies, were, Louisa, wife of G. Sadler, Georgiana, who attained twenty-one and died, Harcourt, Robert, and Sophia. By a joint deed, made in November 1821, a sum of 4,200*l.* consols, part of the trust funds, was appointed to Louisa, on her marriage, with a declaration therein, that she should not be entitled to any further or other share in the trust funds, until she should have put in hotchpot the thereby appointed share, unless a contrary intention should be expressed in the instrument, whereby any further appointment should be made. In December 1821, another joint appointment of 4,200*l.* consols, was made in favour of Harcourt, with a like declaration as to bringing into hotchpot. P. Firmin died in 1826. In 1827, the widow appointed several sums of bank and other stock, not including any consols, to Robert, in trust for Harcourt. In 1829, she also executed an appointment of 3,333*l.* 6*s.* 8*d.*, and 866*l.* 13*s.* 4*d.* consols, to Robert, with a declaration as in the first appointments as to hotchpot. In May 1830, several sums, not including any consols, were appointed to Mrs. Sadler; and, by the same deed, similar sums of like stock were appointed to Robert, and it was thereby declared that they (Louisa and Robert) should not be compelled to bring into hotchpot the shares appointed to them by the former deeds poll, but that they should not be entitled to any further share under the settlement, until they should have put into hotchpot the shares thereby and by the deed of September 1829, appointed. Another appointment of 1,902*l.* 15*s.* consols, and several sums of other stock was at the same time made to Sophia, with a like hotchpot clause. No appointment was made in favour of Georgiana. The moiety

of the husband's portion of the trust funds, amounting to 6,666*l.* 13*s.* 4*d.*, consols, being omitted out of the power of appointment in the original settlement of 1793, and the appointments having been executed in ignorance of that circumstance, the whole of the 3*l.* per cent. stock, subject to the power, was exhausted by the earlier appointments, and the latter appointments were therefore of necessity either wholly or partially inoperative. The settlement made on the marriage of Mrs. Sadler, in November 1821, dated the day after the first joint appointment, recited, by mistake, that the whole of the trust funds were then subject to the powers of appointment; and the settlement on the marriage of Harcourt Firmin, in December 1821, contained a similar recital.

The bill was filed by the trustees, to obtain the direction of the Court in the appropriation of the trust funds. The Master's report stated the funds in which the trust monies were from time to time invested. The cause was heard on further directions.

Mr. Chandless and *Mr. Faber*, for the plaintiffs.

Mr. Jacob and *Mr. Piggott*, for the defendant Harcourt Firmin and his wife.

Mr. Wigram and *Mr. Simpson*, for Robert Firmin and his children.

Mr. Sidebottom and *Mr. Teed*, for Mr. and Mrs. Sadler and their children.

Mr. K. Bruce and *Mr. Bellamy*, for Sophia Firmin.

Mr. Cooper, for the executors of Georgiana.

The only cases cited were upon the effect of the recital in Mrs. Sadler's settlement of November 1821, as shewing the mistake under which the appointment of the same date was executed.

Daubeny v. Cockburn, 1 Mer. 636.

Robinson v. Bransby, 6 Madd. 349.

THE VICE CHANCELLOR.—The question turns entirely on the effect of these instruments. The first is, the appointment of the 12th of November 1821. There may have been a mistake in the minds of the appointors at that time, but if they had then the power of doing that which they actually did, no question can be properly raised upon the deed. Now, at that time,

the appointors had power to appoint the 4,200*l.* consols to Louisa; and, though it may be true that they at the same time supposed they had a larger power, their erroneous supposition in that respect does not affect the validity of the act, which was then done. If therefore the connexion between the appointment and the settlement, made the following day, is such, that the recital in the settlement is introduced into the deed-poll, it cannot have the effect of preventing the deed-poll from operating as it would do, if the power had been rightly understood. I think, that under that power Mrs. Sadler is entitled to the sum of 4,200*l.* consols; and it would be an extraordinary construction of the transaction to say, that it is to be raised out of the general trust property, subject to the power, and not out of the consols, which at that time stood in the names of the trustees, subject to the power. Then the next question is as to the effect of the hotchpot clause. [His Honour read it.] My opinion is, that this clause, in its terms, and also upon the apparent meaning of the parties, extends to all the funds; for the parties evidently then thought that their power did extend to the whole fund. The clause therefore would apply to every instrument under which Mrs. Sadler might subsequently claim to take any part of the trust funds. The next question is, as to the effect of the appointment to Harcourt. The parties, still under the same erroneous supposition as to the extent of their powers, appointed another sum of 4,200*l.* consols to Harcourt. I can put no other construction upon this instrument than this: that so far as there were consols subject to the power, upon which the appointment could operate, so far it must take effect. If then it is the fact, as stated, that there was this sum of 14,284*l.* 14*s.* 10*d.* consols, standing to the account of the trust, of which only 7,618*l.* 1*s.* 6*d.* was subject to the appointment, and the remaining 6,666*l.* 13*s.* 4*d.* not so subject, the appointment could take effect only upon the residue of 7,618*l.* 1*s.* 6*d.* Then there is the hotchpot clause in this appointment, which I think must operate with respect to any part of the trust funds which Harcourt might afterwards acquire; and, therefore, it must operate as to that part of the trust fund which was appointed

to Robert for the benefit of Harcourt. The next question is, upon the appointment to Robert in 1829, which was made in the same terms as the preceding appointments in the year 1821, and purports to appoint 4,200*l.* consols, in two separate sums: the appointor having at that time no power of appointment over any such stock. If there had been anything upon which this appointment could operate, so far, as in the case of the earlier appointments, it must have had effect; but, if there is nothing which it can reach, it must necessarily fail. Then there are the simultaneous appointments of May 1830, to Robert and Mrs. Sadler. These did not assume to affect the consols; and there is no question, that they take effect upon the different sums of stock to which they relate; but they must be subject to the hotchpot clauses in the prior instruments, under which these appointees took interests. The next appointment is, to Sophia, and under this she will of course take those sums of bank and other stock which were subject to the power, but she cannot take any part of the consols, the whole of which, so far as the power extended, having been previously exhausted. The appointments will thus take effect, so far as they successively can, upon the different funds subject to the power; and the hotchpot clauses in the instruments of appointment will have the effect of excluding the parties subject to them, from participation in any part of the trust fund, which is not appointed, or is not capable of being appointed to them.

[Some argument arising with reference to the application of the principles of his Honour's judgment upon the interests of the different parties, the case stood over.]

Nov. 21.—The VICE CHANCELLOR, with reference to the argument as to the inference to be drawn of the intention of the appointors, said that it would not be a satisfactory ground of decision to assume that the parties had some definite intention, when it was obvious that they did not know what they were doing. The effect of the appointments was, to give to the appointees that which was appointed by the several instruments, so far as there were appointable funds remaining, to which they could apply; but the hotchpot clauses

deprived them of the power of taking under the appointments, so far as they were effectual, and of taking also a share in the unappointable fund: they had only the option of taking under the appointments, so far as they could, and giving up all other shares in the trust monies; or of rejecting the appointed funds altogether, and taking their shares of such of the trust monies as did not pass under the appointments. The effect of that might be, if the parties so elected, to give to the child to whom nothing was appointed the whole of the unappointable fund.

V.C. }
Dec. 17. } REES v. KEITH.

Husband and Wife—Payment of Wife's Mortgage Debt—Reduction into Possession.

A woman was entitled to two sums of money, secured by certain mortgages, the legal estate in fee in the premises comprised in one of the mortgages being vested in her, the other in a trustee for her. She married. The mortgagors being applied to for payment, and being unable to pay off the mortgages, the husband procured another person to do so, upon an agreement by him to assign to such person all his (the husband's) interest in the premises. The husband died:—Held, that this was a sufficient reduction of the mortgage money into possession.

Eleanor Ward, in 1820, lent a sum of 350*l.*, upon the security of certain premises, partly freehold and partly copyhold, belonging to R. Reeve, and the premises were conveyed to P. Millard, a trustee, for a term of years, for the said Eleanor Ward and one Chettleburgh, who had advanced some money upon the security of the same property. Eleanor Ward afterwards lent a further sum of 100*l.* on the security of the same premises, and the freehold part was in 1829 appointed by lease and release, and the copyhold part covenanted to be surrendered to the mortgagee, her heirs, and assigns, the legal estate in fee in the freehold premises being thereby vested in her. In 1830, Eleanor Ward lent a sum of 800*l.* upon the security of certain other premises belonging to

S. Cushing, which were also conveyed and surrendered to P. Millard, in trust for her. Eleanor Ward intermarried with W. Rees, in August 1833, and in October following she wrote a letter to her said trustee, requesting him to call in the sums of money so lent, within six months. Reeve being unable then to pay or procure payment of the mortgage money, Millard, the trustee for Mrs. Rees, paid the 450*l.* due on his mortgage; and Cushing being unable to pay off the money lent on his premises, the same were offered for sale, under a power in the mortgage deed, but no more than 600*l.* being offered, Millard, in order that Rees and his wife should not suffer any loss, paid them the sum of 800*l.*, and W. Rees signed a memorandum, agreeing to execute the necessary deeds for conveying and assigning the property to Millard. W. Rees died, and upon a reference to the Master, in two suits, by parties interested in his estate, the Master found that the payment of the 450*l.* in respect of Reeve's mortgage was not a reduction of that sum into possession by W. Rees; and that the payment of the 800*l.* in respect of Cushing's mortgage and the signing of the memorandum by W. Rees, was a reduction by him of that sum into possession.

The widow and the representatives of the husband both excepted to the report.

Mr. Jacob and Mr. Koe, for the plaintiffs, the executors of the husband, argued, that the payment by Millard to the husband, although no conveyance was executed, was a sufficient reduction into possession of the two sums of 350*l.* and 100*l.*

Purdew v. Jackson, 1 Russ. 1; s. c. 4 Law J. Rep. Chanc. 1.

Honner v. Morton, 3 Russ. 65.

Dosnell v. Earle, 12 Ves. 473.

Hutchings v. Smith, 9 Sim. 137; s. c. 7 Law J. Rep. (N.S.) Chanc. 128.

Mr. Wigram and Mr. Lovat, for the defendant, the widow.—This is a debt still owing by the mortgagor; the assignment has affected the right to, but not the nature of, the debt. The husband could not have compelled payment by the mortgagor without giving a re-conveyance of the legal estate. The legal estate was in the wife; she could not have been compelled to have levied a fine to the mortgagor

without giving effect to her equity for a settlement. The wife is seised of the legal estate in the portion of the estate conveyed to her in fee; at the utmost, she is a trustee for the mortgagor or for Millard; she cannot be compelled to convey or release the legal estate, except upon having a provision. The trustee was bound not to convey except as the wife, his *cestui que trust*, should direct. *Doswell v. Earle* is a case of acquiescence by the widow for nine years after the husband's death. It is true, that if a debtor to the wife pays that debt to the husband, the wife's equity is gone; but where he is obliged to come into equity, the wife gets a settlement. Can the husband elude this right in the manner attempted in the present case?

The VICE CHANCELLOR.—This is a very simple point. Suppose the mortgagor had said, by letter, "Mr. Rees, I owe your wife 450*l.*, and I herewith send you a cheque for the money," would not the debt have been gone? and would not the wife be a mere trustee of the legal estate for the mortgagor? The consequence of a contrary doctrine would be, that if a woman has a mortgage in fee, and she marries, the debt could not be paid off during the coverture. It seems to me, I confess, that if the debt is paid, there is an end of the wife's equity. Payment is the most unquestionable reduction into possession.

Plaintiffs' exception allowed. Defendant's exception overruled.

V.C. }
Dec. 15, 19. } HERIZ v. DE CASA RIERA.

Plea—Illegal Contract—Foreign Law.

To a bill to carry into effect a contract made in a foreign country, and to take an account on the footing of such contract, the defendant pleaded, that by the law of such foreign country the contract between the parties thereto was illegal and void, and would subject such parties to criminal prosecution:—Held, that this was a good plea in bar to the relief sought by the bill.

That the plea was not double, on the ground that some of its averments went only to the discovery.

The bill stated, that the defendant, the Marquis de Casa Riera, in June 1827 entered into a contract with the Spanish government for providing tobacco for the royal manufactories of Spain; and he agreed that Don Pio de Elizalde should have one-fifteenth of the profits, but in consideration of important services rendered by Elizalde to Riera, Elizalde should only be required to advance one-thirtieth of the capital, or to be liable for more than one-thirtieth of the loss, if any: the terms of the agreement being expressed in a letter written by Riera to Elizalde, the 20th of June 1828. That Riera supplied the tobacco according to his contract until June 1833, and realized large profits thereby; but without accounting for or paying to Elizalde his proportion of the profits. That Elizalde died in 1836 intestate; and that the plaintiffs, his sisters, were his legal personal representatives. The bill stated, that the defendant, in reply to applications of the plaintiffs, had written them letters in the years 1836 and 1838 promising to come to an account, but that he had afterwards removed to England. The bill also charged that some communications had passed between the defendant and an agent of the plaintiffs in England, in which the defendant had to some extent admitted their claim. The bill prayed an account, and a writ of *ne exeat regno*.

The defendant pleaded, and by his plea averred, that at and prior to the date and making of the alleged agreement, he, the said Don Pio de Elizalde, was a public officer and agent to the Spanish government, and then holding, as such public officer and agent, an office or offices of trust and confidence under the said government, to wit, the office of chief treasurer of the kingdom, and likewise the office of councillor of state; and that by reason thereof, by the laws at that time and still in force in the kingdom of Spain, the said alleged agreement was and is null and void, and the parties to any such agreement as the alleged agreement in the said bill mentioned, would have been, and were, and still would be, and are, by reason of the premises aforesaid, by the laws of the said kingdom of Spain, liable to pains and penalties and

criminal prosecutions, for making and entering into such alleged agreement; and the defendant also averred, that the alleged agreement, if any, was made and entered into in the said kingdom of Spain, and that at and prior to the date and making of the alleged agreement this defendant and the said Don Pio de Elizalde were respectively subjects of and residing and domiciled in the said kingdom of Spain, and under the allegiance of the Spanish government; and the said Don Pio de Elizalde being, as aforesaid, a public officer and agent of the Spanish government, and holding as such an office or offices of trust and confidence under the same government, the alleged agreement was and is, by reason thereof, by the said law, then and still in force in the kingdom of Spain, *ipso facto*, null and void; and the making and entering into such alleged agreement was and is, by reason of the promise aforesaid, a crime against the laws of the said kingdom of Spain, subjecting the parties thereto to pains and penalties and criminal prosecutions for the same.

Mr. Wakefield, Mr. Jacob, and Mr. Rogers, for the plea.—A contract void by the laws of the country in which it is made cannot be enforced in another country.

Armstrong v. Armstrong, 3 Myl. & K. 45; s. c. 3 Law J. Rep. (N.S.) Chanc. 101.

Burge, Colonial Law, vol. 3, p. 795.

Story on Conflict of Laws, pp. 200, 202.

De la Vega v. Vianna, 1 B. & Ad. 284;

s. c. 8 Law J. Rep. K.B. 388.

Talleyrand v. Boulanger, 3 Ves. 447.

Mr. K. Bruce and Mr. Koe, for the bill.—This is in fact a double plea: a plea to the discovery as subjecting the defendant to penalties; and a plea to the relief, on the ground of invalidity in the contract. There may be a case where the plaintiff may not be entitled to an answer to any one of the interrogatories of his bill, and yet there may be no bar to the relief, if the case be proved *aliunde*—*Brownsword v. Edwards* (1). There is no averment in the plea, that by the law of Spain the agreement is avoided; although the parties may be subjected to pains and penalties,

there may be a title to the relief: but this is a plea to the whole relief, as well as to the whole discovery. The criminality and illegality are not necessarily connected, and the plea fails for duplicity. There are two distinct agreements stated by the bill, the original contract, and a contract contained in the subsequent letters of the defendant; the first contract, though illegal by the laws of Spain, may form a good consideration for the subsequently recognized contract, when the parties were not domiciled in Spain—*Barnes v. Hedley* (2). The particular law of Spain, which vitiates the original contract, should be set out. How else is the Court to know whether the contract is void by it? It must be treated as a fact; or as a private act of parliament, and must be pleaded distinctly.

Weaver v. the Earl of Meath, 2 Ves. sen. 108.

The Attorney General v. Brown, 1 Swanst. 265.

Hardman v. Ellames, 5 Sim. 640; s. c. 3 Law J. Rep. (N.S.) Chanc. 74.

THE VICE CHANCELLOR.—The bill in effect represents only one agreement. The whole contract made was, that there should be a participation in the profits of the contract by the party whom the plaintiffs represent, to the extent of a fifteenth. It appears to me, that the letters alluded to only acknowledge the original verbal agreement, and are so far evidence of that contract; but there is no new contract. I have looked at all the subsequent letters, and I cannot see any subsequent promise, except what might arise out of the original contract. There is nothing like that which it is said there is—a double contract. This is a plea to the whole bill, and it alleges the fact, that the contract in question is contrary to the law of Spain, and it makes an averment to support that plea. I see nothing in that averment to avoid the plea. If the fact shall appear to be as it is represented by this plea, there must be an end of the plaintiffs' case.

Plea allowed, with costs; and plaintiffs undertaking to reply; costs of suit reserved (3).

(2) 2 Taunt. 184.

(3) See *Fry v. Richardson*, 9 Law J. Rep. (N.S.) Chanc. 171.

(1) 2 Ves. sen. 246.

L.C.
 June 5, 8; }
 Nov. 19. } IBBETSON v. IBBETSON.

Legacy—Settlement—Chattels—Limitation—Tenant in Tail—Void Gift.

By his will, Sir H. C. I, Bart. devised the reversion in fee of his mansion-house at Denton Park, &c., to the use of his brother, C. I. (afterwards Sir C. I, Bart.) for life, with remainder to trustees, &c., with remainder to the use of the first and other sons of C. I. successively, in tail male, with remainder to the use of J. T. I, in like manner, in strict settlement, with remainder to the use of his own daughters successively, in tail male, with other remainders over for life and in tail, with remainder to his own right heirs. Sir H. C. I. then proceeded as follows: "I give and bequeath unto W. C. and M. W, their executors, administrators, and assigns, all my plate, pictures, books, and household furniture in and about my dwelling-house at Denton Park, upon trust to permit the same to be used and enjoyed by the person and persons who for the time being shall be entitled in possession to my said mansion-house, under or by virtue of the settlement made upon my marriage, or of the limitations contained in this my will, until a tenant in tail, of the age of twenty-one years, shall be in the possession of my said mansion-house, and then the said plate, pictures, books, and household furniture, are to go and belong to such tenant in tail;" and Sir H. C. I, by his will, gave his residuary personal estate to the person who, at his decease, (and who was his brother C. I.) should be entitled in possession to the mansion-house at Denton Park; and he appointed his brother C. I. the executor of his will:—Held, that the gift of the "plate, pictures," &c., so far as it was framed to take effect, after the death of C. I, was void; and that C. I. took absolutely the subject of the specific gift.

Sir Henry Carr Ibbetson, by his will, dated the 11th of October 1814, charged his real and personal estate with the payment of his debts and legacies, and after bequeathing an annuity to his wife, Dame Alicia Mary, gave and devised his reversion or remainder, in fee simple, of and in his manors of Denton and Askwith, and in the parishes of Otley and Weston, in the

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county of York, and all other his manors, messuages, farms, lands, tenements, tithes, hereditaments, and real estates in England, unto trustees and their heirs, to the use of the Earl of Harewood and Sir W. F. Middleton, for the term of 1,000 years, upon certain trusts therein mentioned, and subject thereto and from and after the end or sooner determination of the said term, to the use of his brother Charles Ibbetson, and his assigns, for and during his life, without impeachment of waste, with remainder to the said trustees and their heirs, during the life of the said Charles Ibbetson, in trust to preserve contingent remainders; and from and immediately after the decease of the said Charles Ibbetson, to the use of his first son lawfully begotten, and the heirs male of the body of such first son, with divers remainders over; and the testator by his said will gave and bequeathed unto the said trustees, their executors, administrators, and assigns, all his plate, pictures, books, and household furniture, in and about his mansion-house at Denton Park, upon trust to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled in possession to his said mansion-house, under or by virtue of the settlement made upon his marriage, or of the limitations contained in his will, until a tenant in tail of the age of twenty-one years should be in the possession of his said mansion-house, and then the said plate, pictures, books, and household furniture were to go to and belong to such tenant in tail; and the testator gave and bequeathed all the rest and residue of his personal estate and effects, after payment of his debts and legacies, unto the person who at his decease would be beneficially entitled in possession to his said mansion-house; and he appointed his said brother, C. Ibbetson, his executor. The testator died in June 1825, without issue, leaving his widow and his said brother and heir-at-law, afterwards Sir C. Ibbetson, surviving. Sir C. Ibbetson entered into possession of the personal estate of the testator, and the rents and profits of his real estate. By deeds made between Sir C. Ibbetson and his eldest son and others, in March 1837, the real estates comprised in the will were re-settled, and were then limited and settled to such uses

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as the said Sir Charles Ibbetson and his eldest son, C. H. Ibbetson, should appoint, and in default of appointment to the use of Sir C. Ibbetson, for life, the remainder to the use of trustees, to support the contingent remainders, with remainder to the use of the said C. H. Ibbetson for life, without impeachment of waste, with remainder to trustees to support contingent remainders, with remainder to the use of the first and other sons of the said C. H. Ibbetson, in tail male, and for default of such issue, to the use of F. J. Ibbetson, the second son of Sir C. Ibbetson, and his assigns, for life, without impeachment of waste, remainder to the use of trustees and their heirs during the life of F. J. Ibbetson, upon trust to support contingent remainders to the use of the first and every other son successively of F. J. Ibbetson, one after the other, according to seniority of age and priority of birth, in tail male, and for default of such issue, to the use of the first and every other son successively of the said Sir C. Ibbetson, by any future wife, severally and in remainder, one after another, in tail male, and on failure of such issue, to the use of Laura Ibbetson, the daughter of Sir C. Ibbetson, for life, remainder to trustees to support contingent remainders, with remainder to the use of the first and every other son successively of the said Laura Ibbetson, in tail male, and on failure of such issue, to the use of the first and every other daughter successively, of the said Sir C. Ibbetson, by any future marriage, in tail male, and on failure of such issue, to the use of the said Sir C. Ibbetson, his heirs and assigns for ever.

Sir C. Ibbetson, by his will, November 1838, disposed of the greater part of his personal estate, between his second son, F. J. Ibbetson, and his daughter Laura; and he gave all his plate, bronzes, china, glass, prints, books, and furniture belonging to him, at Denton Park, to his son C. H. Ibbetson, for his life, it being his wish that the same should not be sold, but remain for the use of his said son and his successors, the owners of Denton Park. Sir C. Ibbetson died in April 1839, leaving his said three children surviving. His eldest son, now Sir C. H. Ibbetson, entered into possession of the estates comprised in the will and settlement, and also became

possessed of the plate, pictures, books, and household furniture, in and about the mansion-house at Denton Park, mentioned in the will of the said Sir H. C. Ibbetson, or of so much thereof as remained at the death of Sir C. Ibbetson. In June 1839, a bill was filed on behalf of the plaintiff in this suit, the said F. J. Ibbetson, an infant, to establish the will of his father, Sir C. Ibbetson, and a decree was made, directing the usual accounts relating to the estate. The present bill, which was filed in August 1839, against the said Sir C. H. Ibbetson and the executor and executrix of Sir H. C. Ibbetson, and against Laura Ibbetson, the daughter of Sir C. Ibbetson, and the trustees and other persons interested, stated that the plaintiff was advised that the accounts of Sir C. Ibbetson's personal estate could not be effectually taken, nor the rights and interests of his younger children under his will be properly ascertained, nor a sufficient portion of the interest of their respective fortunes be safely applied for their maintenance, until the accounts of the debts and personal estate of Sir H. C. Ibbetson, should have been first taken, and his assets possessed by Sir C. Ibbetson separated from the personal estate of the latter; and it prayed that the trusts of the will of Sir H. C. Ibbetson might be carried into execution, and the necessary accounts taken for that purpose, and that it might be declared that the trusts therein contained of the plate, pictures, books, and household furniture in and about the mansion-house at Denton Park, were void for remoteness, and that the same formed a part of the general residuary personal estate of the said testator; and that the same, or so much thereof as remained at the death of Sir C. Ibbetson, might be ordered to be given up, or accounted for to the personal representatives of Sir H. C. Ibbetson, and applied as part of his personal estate.

The cause was heard before the Vice Chancellor.

THE VICE CHANCELLOR.—On the 11th of October 1814, Sir Henry Carr Ibbetson made his will. At that time, by virtue of a settlement made on his marriage with Lady Alicia Mary Ibbetson, his mansion-house at Denton Park stood settled to the use

of himself for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the marriage severally and successively in tail male, with remainder to the use of Sir Henry Carr Ibbetson, in fee. By his will, Sir Henry Carr Ibbetson devised the reversion in fee of his mansion-house, to the use of his brother, the late Sir Charles Ibbetson, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Sir Charles Ibbetson, severally and successively in tail male, with remainder to the use of his brother John Thomas Ibbetson, in like manner, in strict settlement, with remainder to the use of his own daughters severally and successively in tail male, with several remainders over, for life, and in tail, with remainder to his own right heirs.—[His Honour here stated the gift of the plate &c. already set forth, and then proceeded as follows :]—He afterwards made a codicil, not affecting the mansion-house in specific gift, or the residuary bequest, and died in 1825 without issue. In September 1825, the will was proved by Sir Charles Ibbetson, who, on the testator's decease, became beneficially entitled in possession to the mansion-house, and consequently was his residuary legatee. He has died lately. Before the testator's death, the present Sir Charles Henry Ibbetson was born, and has now attained the age of twenty-one years.

The question is, who became entitled to the subject of the specific gift? The words in this case are singular, and unlike the words in any other case. The gift is in the form of a simple declaration of trust, not requiring any settlement to be executed. It has no such qualifying words as are found in the case of *Gower v. Grosvenor* (1), and other cases, namely, "as far as they can by law," or "as far as the rules of law and equity will permit." The gift referring to the limitations in the settlement, and in the will, of the mansion-house, meant to pass the chattels in succession; but the trust is so expressed, that if it were literally carried into effect, it might have happened, to use the expression of Lord Eldon in *Ware v. Polhill* (2), that no tenant

in tail of the age of twenty-one years might have been in possession of the mansion-house for two centuries, and consequently the absolute interest in the plate and other articles would not have vested during that time. In *Marshall v. Holloway* (3), the same great authority says, "The trust for accumulation in this case, I think, bad, because it may last for ages;" and under the will of Sir Henry Carr Ibbetson, the suspension of the chattels might have endured for ages.

The fact that a tenant in tail of the age of twenty-one years has become possessed of the mansion-house within the space of twenty-one years from the death of the testator, is immaterial, for the validity of the gift must be determined by considering how it stood at the death of the testator; and unless it was then such as that, if it took effect at all, it must of necessity have vested the absolute interest in some one within the period allowed by law, it was bad then, and must be so now. For, as Sir William Grant said in *Lord Southampton v. the Marquis of Hertford* (4), "an executory devise exceeding the allowed limits, is void *in toto*;" and in *Tollemache v. the Earl of Coventry* (5), Lord Brougham says, "To argue from the fact, that the person was *in esse* at the date of the will, who became Lord Vere, is to rely upon an accident. The event might have been otherwise. He would not *ex necessitate* answer the description within the allowed period.—The estate must be certain, so as within the time to vest in the person described." And upon the fullest consideration, I am of opinion, that so far as the gift was framed to take effect after the death of Sir Charles Ibbetson, it was void. Whether it was good as a gift to him for life only, and void as a gift in remainder after his death, or whether it might be construed as a gift absolutely to Sir Charles Ibbetson, according to what seems to have been the opinion of Lord Brougham upon the gift in Lord Vere's will, to the third Lord Vere, it is not necessary to decide, because Sir Charles Ibbetson was residuary legatee. Upon the whole, I think, that under the will of Sir Henry Carr Ibbetson, Sir Charles Ib-

(1) 5 Mad. 337.

(2) 11 Ves. 257.

(3) 2 Swanst. 432.

(4) 3 Ves. & Bea. 59.

(5) 8 Bligh, N.S. 347.

betson took absolutely the subjects of the specific gift.

The defendant, Sir C. H. Ibbetson, appealed from the decision of his Honour.

Mr. Jacob, Mr. Bethell, Mr. Koe, and Mr. Hodgson, in support of the appeal.—

Sir Charles Henry Ibbetson is entitled in every way; he is the person answering the description of tenant in tail, and was so at the death of the testator. In all cases, property given as heir-looms, vests in the first tenant in tail. In gifts to co-heiresses, as tenants in common, or joint tenants, the gifts cannot be severed, but that is not so as to a class taking successively property to be held with the title. The present is not a case where an accumulation is directed for a period transgressing the bounds assigned by law. The rule laid down in *Deerhurst v. the Duke of St. Albans* (6) is consistent with every authority; and *Ware v. Polhill* is an authority in favour of the defendant, Sir C. H. Ibbetson; and it was there held, that leaseholds passed to first tenant in tail absolutely. Another observation on the case is, that if it be admitted that the gift is good, for and during the life of Sir C. Ibbetson, why should it not be good for the life next ensuing, viz. the life of Sir C. H. Ibbetson? The words "use and enjoyment," sometimes have been held to have different meanings; as in *Deerhurst v. the Duke of St. Albans*, where Sir J. Leach seems to have considered that the words "use and enjoyment" might confer the right to the property. Again, if the intention of the testator be wholly void, how comes the decree to give Sir Charles Ibbetson an estate for life?

Mr. G. Richards and *Mr. L. Wigram* appeared for the respondent Laura Ibbetson, and argued in favour of the decision in the court below.

Mr. Turner and *Mr. Atkinson*, for the respondent, the plaintiff, contended, that the absolute interest in the chattels was kept in suspense beyond legal limits, and that the divesting proviso had the effect of giving the chattels over from time to time, from the person entitled to the enjoyment for the time being, unless he attained the age of twenty-one years.

(6). 5 Mad. 232.

The other cases cited in the course of the argument were—

Trafford v. Trafford, 3 Atk. 347.

Forth v. Chapman, 1 P. Wms. 668.

Vaughan v. Burslem, 3 Bro. C.C. 101.

Ellicombe v. Gompertz, 3 Myl. & Cr. 127.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & Bea. 54.

Foley v. Burnell, 1 Bro. C.C. 274.

Jee v. Audley, 1 Cox, 324.

Routledge v. Dorril, 2 Ves. jun. 357.

Proctor v. the Bishop of Bath and Wells, 2 H. Black. 358.

The Duke of Bridgewater v. Egerton, 2 Ves. sen. 122.

The LORD CHANCELLOR.—I am of opinion, that the Vice Chancellor's judgment must be affirmed. The claim under the gift to the first tenant in tail of the age of twenty-one, who should be in possession of the testator's mansion-house, is clearly too remote. There might be successive tenancies in tail lasting for any number of years, without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended, if such contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period, renders the gift void, although the contingency has, in fact, happened within that period.

The title, however, on which the present appellant relied, was the preceding direction, that until this contingency should happen, the property should be used and enjoyed by the persons for the time being entitled in possession to the mansion-house under and by virtue of the limitations in the settlement or will; under these limitations, the appellant's father was tenant for life in possession, until his death in 1839, and he, the son, never under this direction had any interest in the property, because the moment he, by his father's death, for the first time answered the description of the person entitled to the mansion-house, he being tenant in tail of the age of twenty-one, at that moment the event happened, which determined the application of the rents under the former direction. Nor could the case have been different, if the appellant had at that time been a tenant in tail in possession under

twenty-one, because although the clause in the will respecting the chattels refers to the limitations of the real estate, for the purpose of describing the person who was to have the use and enjoyment of them, and therefore, if that had been the whole of the direction, would have given the absolute property in the chattels to the first tenant in tail of the land, yet that could not have been the result of the direction in the will, for it does not refer to a limitation of the land for the purpose of affecting the chattels, but it produces this important difference, that all interest prior to the tenant in tail attaining twenty-one, shall be liable to be defeated by the happening of that event, so that if the limitations could be considered as repeated in the clause respecting the chattels, they must be so repeated with the alteration the testator has directed, and they would therefore stand thus—to be used and enjoyed by the appellant's father for his life, and after his death, to the person then entitled in possession to the mansion-house, until some tenant in tail attaining twenty-one, should be in possession thereof, and then to go and belong to such tenant in tail. Upon this point, *Trafford v. Trafford* is strongly in point.

The appellant cannot claim as tenant in tail in possession, of the age of twenty-one, because that limitation is too remote; nor under the intermediate gift, because that is determined by there being a tenant in tail in possession, of the age of twenty-one. In the case of *The Duke of Newcastle v. Lady Lincoln* (7), Lord Eldon observed on the difference between contracts for settlement and wills, saying, that "the Court is not to do for a testator all that can be done by law, but it is to do no more than what the testator has intended to be done, and according to the common acceptance of the words." That observation applied to the ordinary case of chattels being given by a will, to go according to the limitations of land; they would vest absolutely in the first tenant in tail; but it is competent for a testator to prevent such a consequence, and, in my opinion, the testator in this case has done so.

It may be said, that if the gift to the

first tenant in tail is too remote, so must be the direction for the application of the rents, till the event should happen. If there be this objection to the directions which the testator has made in his will, it will afford no reason for introducing into the will a gift of an estate tail, which he has not only not directed, but was evidently anxious to avoid. The gift of an estate to a tenant in tail in possession at twenty-one negatives the intention of benefiting any one who should not answer the whole of that description.

It was said, the decree was, at all events, wrong, in declaring the gift void after the death of Sir Charles Ibbetson, the appellant's father, who was the residuary legatee. This is not an objection this appellant can urge, and the representatives of Sir Charles Ibbetson have not appealed. The appeal must be dismissed with costs.

L.C. } ATTORNEY GENERAL
Dec. 11, 12, 14, 17. } v. WILSON.

Municipal Corporation Act, 6 Will. 4. c. 76, Construction of—Breach of Trust—Corporations—Parties.

Before leave had been obtained to bring in the Municipal Corporation Act, but after notice had been given in the House of Commons of the intention of government to introduce such a measure, a corporation passed a resolution on the 30th of May 1835, that a sum of stock and some turnpike bonds belonging to them should be transferred to certain persons, "so as to vest in them, and to divest the corporation of all power and controul over the same;" and a deed of transfer, dated the same 30th of May, was accordingly executed by the corporation. In November, deeds were executed by the parties to whom the stock and turnpike bonds were transferred, declaring the purposes to which it was to be applied, and which were for the benefit of certain charitable institutions, and for the endowment or enlargement of churches within the borough:—Held, that the resolution and deed of May 1835 did not divest the corporation of their interest in the trust property.

A corporation is entitled to relief against acts done by the officers of the corporation,

(7) 5 Ves. 387.

where such acts amount to breaches of trust against the corporation.

Where several members of a corporation joined in committing a breach of trust against the corporation, the corporation was held entitled to redress against some of those members, without bringing all of them before the Court.

A statement of the circumstances of this case will be found in 7 *Law J. Rep.* (N.S.) Chanc. 76, when the cause came before the Vice Chancellor, on demurrer. The cause now came on to be heard before the Lord Chancellor.

It appeared, that the corporation had executed a deed, dated the 30th of May 1835, by which they assigned to the three trustees the funds which this information sought to recover. One of the defendants, Mr. Brown, who was the treasurer of the Leeds General Dispensary, stated in his answer, that on or about the 24th of February 1836, a sum of 3*l.* 15*s.* was paid into the defendants' bank by Messrs. Beckett, Blayds & Co., of Leeds, to be passed to the credit of the treasurer of the Leeds General Dispensary; and at the same time, the said Messrs. Beckett, Blayds & Co. required this defendant to give them a special receipt for the same, stating, that such payment was half a year's dividend on 250*l.* stock, standing in the name of the trustees for the benefit of the said charity; that not having any knowledge whatever of the said stock, or of the said trusts alleged to have been created, he declined to give any special receipt, but expressed his readiness to give, and did accordingly give, a simple acknowledgment that he had received the sum of 3*l.* 15*s.* for the benefit of the said dispensary; and he said, that he was not a party or privy to any such plan or scheme as in the said amended information alleged, or to any other plan or scheme, for the purpose of alienating the property of the corporation.

The Attorney General, Mr. Jacob, Mr. Wigram, and Mr. Walker, appeared in support of the information.

Sir Charles Wetherell, Mr. Bethell, and Mr. Atkinson, for the three trustees and five members of the old corporation.

Mr. Loftus Wigram, for the incumbents of St. Mary and Christ Church, and for the churchwardens of St. Mark's; and—

Mr. Roundell Palmer, for the treasurer of the dispensary.

An objection was raised for want of parties, on the ground, that all the old members of the corporation who had taken part in the alleged breach of trust ought to be before the Court; but the Lord Chancellor overruled the objection.

December 17.—**THE LORD CHANCELLOR.**—There can be no question but that the attempts to alienate the property of the corporation were ineffectual; and that so much of it as is now forthcoming must be restored, and compensation made for so much of it as is not forthcoming. That the 6,500*l.* 3*l.* per cents., and the 500*l.* due upon the turnpike bonds, were the property of the corporation, is beyond all doubt, and the defendants in this cause cannot dispute it, because they so treated it. The deed of the 30th of May 1835, did not affect the character of the fund as an assignment, without consideration, and for a particular purpose, except, inasmuch as it was a giving of the property to the three trustees, and the particular purpose was never carried into effect. The trust fund continued for the benefit of the assignors, that is, the corporation.

So the matter stood on the 9th of September 1835, when the Municipal Corporation Reform Act passed. From that moment, whatever property belonged to the corporation became affected with the trusts declared by that act, and all attempts at alienation for purposes inconsistent with the objects of that act were illegal and void. This was the ground of my decision in *The Attorney General v. Aspinall* (1), and I have not since heard any good reason suggested for altering the opinion upon which I then acted. It follows, that the alienation subsequently attempted of the property in question, being obviously, and indeed professedly, for the purpose of defeating the objects of that act, was illegal.

There is no distinction to be made, for the purpose of recalling the property, be-

(1) 2 *Myl. & Cr.* 613; s. o. 7 *Law J. Rep.* (N.S.) Chanc. 51.

tween that part which remains in the hands of the three trustees, and those parts which have passed to the hands of the different defendants. The attempts to bestow the property upon them were by means of deeds, which recited the deed of the 30th of May, and all were made after the passing of the act. All the parties, therefore, had, or must be presumed to have had, notice of the illegality of the attempted transfers, and all were voluntary and without consideration. I consider it, therefore, as a matter quite of course to decree the restoration of all the property now forthcoming, in the hands of any of the defendants, to the plaintiffs for the purposes of the act.

But it was said, that such relief cannot be given in a suit in which the corporation are plaintiffs, because the acts complained of were the acts of the corporation, and that a *cestui que trust* cannot complain of the breaches of trust to which he was a party. This objection was ingeniously argued, but it has no foundation to support it. What the present plaintiffs, the corporation, complain of is, that certain persons, members of the corporation at a former time, fraudulently and illegally used the power and authority of the corporation, for the purpose of depriving it of property to which it was by law entitled. Is it to be said, that the corporation are without remedy? It is true that now, after the act, such property being in trust for the benefit of the public, the Attorney General may assert the right of the public in an information. But if, before the act passed, the corporation might in a proper case institute suits for the purpose of setting aside transactions fraudulent as against them, though carried into effect in the name of the corporation, that right cannot be affected by the Attorney General having also power to complain of the transaction. In the great majority of suits instituted in this court, for the purpose of rescinding transactions, it is the act of the plaintiff himself which he seeks to rescind; he says, "The act was mine, but it arose from a fraud or other misconduct of those who have had the management of the affair." Why may not a corporation, upon the same ground, have the same relief? Why are they alone to be denied the exercise of that most important jurisdiction of

this Court? Certainly not because their affairs do not require it. The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purpose for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests and alienating its property, shall the corporation be stopped in this court from complaining, because the act was ostensibly an act of the corporation?

Not to go further into the authorities, for it is quite unnecessary to do so, than the cases cited for other purposes, it will be found, that Lord Hardwicke, in the case of *The Charitable Corporation v. Sutton* (2), and Lord Eldon, in the case of *The Corporation of Colchester v. Lomten* (3), did not seem to have felt any difficulty upon the subject. I am, therefore, of opinion, that any relief which the case calls for may be properly administered in this suit; and I am of opinion, that this is the principle to be acted upon, independently of the provisions of the 97th section. And it is to be observed, that that section had an object which does not apply to the present case. That object was to enable a corporation to call in question acts which might have been done before the passing of the act, and after the 5th of June; and which, therefore, might be strictly legal in themselves; whereas in this case, the acts called in question were after the passing of the act, and therefore from the beginning illegal; the deed of the 30th of May, though intended for that purpose, being inoperative.

I am the more induced to mark this distinction, because some observations of mine in *The Attorney General v. Aspinall* were referred to in support of the argument, that the corporation in this case cannot be heard to impeach its own acts; whereas those observations were, in terms four times repeated in that passage, confined to acts between the 5th of June and the passing of that act; and therefore have no application whatever to the present case.

Connected with this objection was another, which was the subject of the main

(2) 2 Atk. 400.

(3) 1 Ves. & Bea. 226.

argument in the cause—namely, the liability of the five corporators. I say connected with the objection I have before considered, because it proceeds upon a similar supposition, that the whole was a transaction of the corporation, and therefore that the corporation is on the one hand prevented from complaining of it, and on the other cannot call in question the acts of any member of the corporation for the part he took in the corporate act. I think both objections are founded upon the same error—namely, that of confounding the legitimate acts of the corporation with unauthorized acts effected by members or agents of the corporation in the name of the corporation. Of those the corporation may complain, and may have redress against such members or agents as are the authors of the wrong. No doubt can be entertained of the right of the corporation to redress against their agents. Can it be that no redress can be had against the authors of the wrong, because they were members of the corporation, and effected the wrong by an abuse of the power which that situation gave them? In *The Charitable Corporation case*, Lord Hardwicke draws a distinction between the acts for which a member of the corporation would be liable, and those for which he would not. He says, "Committee men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance. Now, where acts are executed within their authority, as repealing bye-laws and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that these are breaches of trust. For it is by no means just in a Judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and therefore were guilty of a breach of trust." Lord Hardwicke then proceeded to consider the evidence of misconduct imputed to the committee men. I have a similar duty in this case to perform, with respect to the five members of the governing body: in doing which I shall say no more, in the case proved

against them, than is necessary for the purpose of explaining the grounds of my decree.

As members of the governing body, it was their duty to the corporation, whose agents and trustees in that respect they were, to preserve and protect the property confided to them: instead of which, having previously, as they supposed, placed the property by the deed of the 30th of May 1835, in a convenient position for that purpose, they took measures for alienating the property, with the avowed design of depriving the corporation of it; and with this view procured trusts to be declared, and transfers of part of the property to be made to the several other defendants in the cause, for purposes in no manner connected with the objects to which the funds were devoted, and for which it was their duty to protect and preserve them.

This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate, every individual of whom had an interest in the fund for his exoneration *pro tanto* from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him controul, can there be any doubt but that such agent or trustee would in this court be made responsible for so much of the alienated property as could not be recovered in specie? But if Lord Hardwicke was right in *The Charitable Corporation case*, and if I am right in this case, in considering the authors of this wrong as agents or trustees of the corporation, the two cases are identical.

I cannot doubt, therefore, but that the plaintiffs are entitled to redress against the three trustees and those members of the governing body, who were instrumental in carrying into effect the acts complained of. It is proved, that the five defendants fell under that description. The object of the deed of May 30th, 1835, was avowedly for the purpose of stripping the corporation of all its property before the bill then in parliament should pass into a law. I have already said, that it had not that effect: but can these defendants avail themselves of the failure of their scheme, and say that was

an innocent act, when they, with others, by the memorial presented to the trustees, assumed to themselves, as individuals, the right to interfere in the misapplication of the funds? They seem to have supposed that the three trustees held the funds, subject to the direction of individual members of the governing body, upon the assumption, that the title of the corporation had been effectually terminated. These five defendants, being agents and trustees of the corporation funds, though the legal title was not vested in them, by an illegal exercise of the power of the corporation procured the funds to be diverted from their legal custody and purpose, placed in other hands, and applied to other purposes. Of their liability to make good any deficiency in the funds arising from such conduct, I entertain no doubt. Lord Hardwicke thought so a century ago, and certainly the jurisdiction of this Court in such cases has been extended rather than restricted since that time.

It was then urged, that if this was so, all the governing body at that time who took any part in these transactions ought to be made defendants. Upon this point also Lord Hardwicke's authority in *The Charitable Corporation case*, is of the highest value. It was in that case urged, that as the injury had arisen from the misconduct of many, each ought to be answerable for so much only as his particular misconduct had occasioned; but Lord Hardwicke said, that if this doctrine should prevail, it would indeed be laying the axe at the root of the tree. But he said, that "if upon inquiry before the Master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty; nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or a public capacity."

In cases of this kind, when the liability arises from the wrongful act of parties, each is liable for all the consequences, and there is no contribution between them; and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all persons parties who may more or less have joined in

the act complained of, nor would any one derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any one. It is evident that Lord Hardwicke, in the case of *The Charitable Corporation*, considered that each defendant would be liable for each transaction in which he had been a party.

In *The Attorney General v. Brown* (4), Lord Eldon overruled a demurrer for want of parties. He did not state that, but it appears that the charge against the commissioners was for misconduct, and the object of the suit was to regulate their future conduct, and some only of those who had acted in the matters complained of, were parties.

In this case other names appear to the resolutions and the memorial, but there is no proof before me that the conduct of any other members of the corporation was such as to subject them to the responsibility which I think attaches to these defendants; and if that had arisen, it would not have afforded them any protection. I am therefore of opinion that they cannot support the objection, that others ought to be co-defendants with them.

It only remains to consider the form of the decree. It must declare that the 6,500*l.* 3*l.* per cents., and the 500*l.*, notwithstanding the deed of the 30th of May 1835, continued and was the property of the corporation at the time of the passing of the act, intituled, 'An act to provide for the regulation of municipal corporations in England and Wales,' and was therefore, at that time, subject to all the trusts and purposes prescribed by that act, and that all subsequent alienations of such stocks and funds for any such purposes, particularly the deeds of the 30th of May and the 24th of November 1835, were breaches of trust, and fraudulent and void; and it must be declared that the three trustees and the five members of the governing body are liable to any loss which may be sustained therefrom. It will then be necessary to direct the several defendants to re-transfer the several sums transferred to them; and it must be referred to the Master to inquire

what part of such stocks and funds, other than such as have been so transferred to others of the defendants, and therefore capable of being re-transferred, have been sold or disposed of, and when and by whom, and by whose direction and authority, and in what manner the same and the proceeds thereof, and each and every part thereof, have been paid, applied, and disposed of, with liberty to the Master to state special circumstances; there must also be an account of all such property and of the dividends and profits. The costs of the suit to the hearing to be paid by the three trustees and the five members of the corporation.

His Lordship added, that upon the re-transfer of the trust funds, the incumbents would no longer be necessary parties to the cause: that with regard to the treasurer of the dispensary, if he received the *£*l. 15s., with a knowledge that it was money which ought not to be applied for such a purpose, he ought to repay it: but as he said in his answer, that he did not know where it came from, and he held it as trustee for a charity, he ought not to be called upon to repay it, but the trustees must pay it back; and the bill might be dismissed as against him, with costs, such costs to be repaid to the plaintiffs by the other defendants; but his Lordship expressed his disapprobation of the proceedings of the treasurer of the dispensary, in having appeared by a separate solicitor.

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| L.C. | } | THE ATTORNEY GENERAL |
| Nov. 30, | | RAL V. THE EARL |
| Dec. 3, 4, 5, 1839; | | OF STAMFORD AND |
| Dec. 2, 1840. | | OTHERS. |

Charity—Act 52 Geo. 3. c. 101—Attorney General—New Scheme—Attorney General's Sanction—Statutes—Free Grammar School—Cy-pres Doctrine—A, B, C—Information—Boarders—Residence of Trustees—Accounts.

Where a petition had been presented to the Court, under the act of 52 Geo. 3. c. 101, for the purpose of obtaining its sanction to a particular scheme for the regulation of a charity, and an order had been made by the

Court confirming the Master's report as to such scheme, such order will be no answer to an information by the Attorney General, complaining of a scheme adopted on a report obtained under that act in his absence.

The Attorney General ought always to be a party to inquiries directed to the Master under the statute 52 Geo. 3. c. 101.

Where much money has been expended, and many new interests have been created under a scheme adopted by the Court, under the act 52 Geo. 3. c. 101, the Court will endeavour to protect them; and in the case of a scheme adopted by the Court, where no one had attended before the Master on behalf of the Attorney General, the Court retained so much of the scheme as was worthy of its sanction, and corrected so much of it as appeared objectionable, and sent it back to the Master with certain directions, for the purpose of giving the Attorney General an opportunity of bringing forward such suggestions as the interests of the public and the charity might appear to require.

Where the statutes prescribe a mode in which receiver's accounts are to be settled, and there is no allegation or proof in support of any case of neglect or error in the performance of that duty, it will be presumed that the parties to whom the duty is assigned, have faithfully performed it.

Where the design of the foundation of a charity school is the gratuitous education of the objects thereof, the Court is not justified in granting permission to the masters of the school to take boarders into their houses, unless on the conviction that the purposes of the charity will not be prejudiced by the exercise of it; and where the funds of a charity yielded sufficient remuneration to the masters of the school, the Court expressed its dissatisfaction with a scheme sanctioning their taking boarders, and declared that the boarders could not be considered as scholars of the charity, for the purposes of participating in its funds, or being in future elected to the exhibitions from the schools without submitting to the provisions required by the statutes.

One of the foundation ordinances of the charity was to instruct and teach all boys and very young children ("pueros et infantes"), that should come to learn their "A, B, C, primer and sorts, till they be in grammar:"—Held, that the charity funds being ample

for the purpose, the object ought to be to provide the means of gratuitous instruction in all branches of learning and information, which might be most likely to be beneficial to the scholars, and that children under six years of age, if capable of receiving instruction, ought not to be excluded.

By an indenture, written in the Latin tongue, dated the 20th of August, 7 Hen. 8. (1515), made between Hugh Oldham, Bishop of Exeter, the Rev. Thomas Langley, Rector of Prestwick, Hugh Bexwyke, and Ralph Hulme, of the first part, the Abbot and Convent of Whaley, of the second part, and the Warden and Fellows of the College of Manchester, of the third part, reciting that the said parties had often taken into consideration that the youth, particularly in the county of Lancaster, had for a long time been in want of instruction, as well on account of the poverty of their parents as for want of some person who should instruct them in learning and virtue; and therefore, to the intent that there should be some fit person to teach youths and boys freely, without any thing to be given to or to be taken by him, had covenanted and agreed, as therein mentioned; and reciting that the said Hugh Bexwyke and Ralph Hulme, with Joan Bexwyke, widow, had, by indenture, bearing date the 20th of June then last, demised to the said warden and fellows all their lands, tenements, rents, and services of the water corn mills, called Manchester Corn Mills, and all their tolls as therein particularly mentioned, to the tenants of Lord De la Warr for seventy years, at the yearly rent of thirteen marks, payable to the said Lord De la Warr; and that the same persons had, by deed of the same date, released to the warden and fellows all their right in the said premises, to the use and intent therein expressed, and that the said Ralph Hulme and Richard Hunt had by indenture, dated the 2nd of July then last, demised to the said warden and fellows the messuages, lands, and tenements therein particularly mentioned and described, and situate in Ancoats, (and which they had held jointly with certain other persons therein named,) of the gift of Barnard Oldham, Archdeacon of Cornwall, to hold to the said warden and fellows

for the like term of seventy years, paying the accustomed rents and services to the chief lord; and further reciting, that the said Ralph Hulme and Richard Hunt had, by deed bearing date the 6th of July then last, released all their right and interest in the premises to the said warden and fellows and their successors, to the use and intent therein expressed, all which premises before mentioned were therein stated to be of the yearly value of 40*l.*, and were given to the warden and fellows, to the intent that they, with the rents and profits thereof, should perform the agreements thereafter expressed; it was witnessed that, for the performance and execution of so great a work, the parties covenanted and agreed that the said Hugh Oldham, Bishop of Exeter, the said warden and fellows, and the said Thomas Langley, Hugh Bexwyke, and Ralph Hulme, during the lives of the said bishop, and of the said Thomas, Hugh, and Ralph, should provide and nominate a fit person or regular, learned and fit to be master, to teach and instruct scholars in grammar in the town of Manchester, according to the form of grammar then taught in the school of Bunbury, in Oxfordshire, and an usher or substitute to such Master, to teach such grammar in his absence, or for his assistance; and after the death of the persons above named, that the said warden and fellows for the time should for ever provide such master; and the said warden and fellows agreed to pay annually, without any deduction, 10*l.* to the said master, and 5*l.* to the said usher; and a master and usher therein named were appointed as the persons who should first freely and without anything to be therefore given them (except their stipend and salary), instruct in grammar *all boys and very young children*, (the words in the deed being "*pueros et infantes*"), in the town of Manchester, coming to them in the place appointed for that purpose; and upon every nomination of a master and usher so to be appointed as aforesaid, the said warden and fellows should cause the said master and usher respectively to take an oath impartially and indifferently to teach and correct the boys and scholars, and to use due diligence herein, and that they would not take any of the smallest gifts, by colour

of their office, or for their teaching, except their stipends.

By indenture of lease, dated the 11th of October, in the 7th year of Hen. 8, the warden and fellows demised the lands, tenements, rents, and services of the Manchester Corn Mills, and also the said messuages, lands, and tenements in An-coats, to the said Hugh Bexwyke and Joan Bexwyke for sixty years, at the yearly rent of 15*l.* 18*s.*, above the thirteen marks payable to Lord De le Warr. By indenture of feoffment, dated the 1st of April, in the 16th year of Hen. 8, the said Hugh Bexwyke and Joan Bexwyke granted and confirmed to Lewis Anthony and others, their executors and assigns for ever, as trustees, the said corn mills, school-house, and the land on which the school-house was built, and other hereditaments specified in the said indenture, to the use of Hugh and Joan, during their lives, and the life of the longest liver, to the intent that they and the survivor of them might fulfil the acts, ordinances, provisions, institutions, articles, assessments, and assignments, specified in certain schedules to the said indenture annexed; and after the death of both the said Hugh and Joan, to the use and intent that the said Lewis Anthony and others, and their heirs and assigns, might for ever fulfil the said acts, ordinances, &c. Amongst other acts, ordinances, &c., comprised in the last-mentioned indenture, it was ordered, that the trustees or feoffees should, out of the rents arising from the premises, keep in repair the "Manchester School-house," as by the direction of the Warden of the College of Manchester or his deputy, and the Churchwardens of the College Church for the time being, should be thought necessary: that after the deaths of Hugh and Joan Bexwyke, the President of Corpus Christi College, for the time being, should name and elect a school-master and usher, and either of them, being a man honest and literate, as they should think convenient: that every schoolmaster and usher for ever, from time to time, should teach freely and indifferently every child and scholar coming to the same school, without any money or other rewards, except only his stipend and rewards thereafter specified: that the high

master, for the time being, should always appoint one of his scholars, as he thought best, to instruct and teach, in one end of the school, all infants that should come there to learn "their A, B, C, primer, and sorts, till they be in grammar;" and every month to choose another new scholar so to teach infants; and if any scholar should refuse so to teach infants, he was to be banished the school for ever: that when it should happen the said feoffees to die, and be reduced to the number of four, the same four to make like feoffment and articles, in manner as then was, to twelve honest gentlemen and honest persons within the same parish of Manchester, and so they in like manner, from time to time for ever, when it cometh to the number of four, to the use aforesaid: that when it should happen the chest to be at surplusage the sum of 40*l.*, the rest to be given to the exhibition of scholars at Oxford or Cambridge, which have been brought up in the school of Manchester, and only such as study art in the said universities and to such as lack exhibition by the discretion of the said warden or deputy and high master for the time being, so no one scholar have yearly above 26*s.* 8*d.* paid sterling; and that till such time as he have some promotion by fellowship of one college or hall, or other exhibition, to the sum of seven marks: that notwithstanding those statutes and ordinances before written, yet because in time to come many things might and should survive and grow by sundry occasions and causes, which, at the making of these present acts and ordinances, were not possible to come to mind, in consideration whereof, greatly trusting to the fidelity of the said feoffees and others thereafter to come, the feoffors willed that the feoffees, from time to time, when need should require, calling to them discreet counsel and men of good literature, they to have full power to augment, increase, expound, and reform all the said acts, ordinances, &c., only concerning the school-master, usher, and the scholars, for their and every of their offices concerning the said free school for ever.

After divers mesne conveyances, assignments, and appointments, made and executed in manner aforesaid, the mills, lands, and premises became vested in the Earl of

Stamford and others, as trustees for the purposes of the charity called Manchester School, very few of whom, if any, were resident in the town of Manchester. By a public act of parliament, passed in the 32 Geo. 2, the inhabitants of the town of Manchester were discharged from the custom of grinding their corn and grain (except malt) at the Manchester Corn Mills, on making a proper recompence to the trustees. The lands, mills, and estates belonging to the charity became, in the process of time, very greatly increased in value, and the trustees of the Manchester school and warden of the said college authorized changes to be introduced by the high master and usher in the nature and course of the studies, and laid out and expended a considerable portion of the annual revenues arising from the said charity estates, in the payment of exhibitions to the scholars of the said school, to assist them in prosecuting their studies at the Universities of Oxford and Cambridge, and sanctioned a practice by which the several masters in the said school received a number of pupils in the character of boarders into their respective dwelling-houses, and such boarders, at the same time that they attended gratuitously as day-scholars, at the Manchester school, also paid considerable sums of money to the masters, in respect of their board and education.

A petition was presented, in the month of May 1833, by the trustees, under the act of 52 Geo. 3, entitled, 'An Act to provide a summary remedy in cases of abuses of trusts created for charitable purposes;' and an order was made thereon in June 1833, by which it was referred to the Master to inquire into the state of the charity in question, and to settle and approve of a scheme for the future establishment and management of the Free Grammar School, having regard to the amount of the annual income of the said charity estates. The Master, by his report, dated the 13th of July 1833, made in pursuance of the said last-mentioned order, found (amongst other things) that the yearly value of the charity estates was 4,550*l.* 6*s.* 6*d.*; that the salaries of the high master and usher of the said school had from time to time been increased by

the trustees, and that the then salaries of the high master and usher were respectively 500*l.* and 250*l.*, in addition to houses of which they had the use; that the high master and usher had for many years past been permitted by the trustees of the school to receive boarders into their houses; that the number of exhibitions for scholars to Oxford and Cambridge from the said school, and the amount paid with them, had from time to time been increased by the trustees for the time being; and that the number of exhibitions from the school at Cambridge and Oxford was then twelve, in respect of each of which the yearly sum of 60*l.* was paid; that all boys of the age of six years old and upwards, who were able to read English, were admitted to the said school on application to the high master, and were placed in the lower school, unless sufficiently instructed to take a higher place, and were then instructed in classes according to their proficiency in reading English, writing, and arithmetic, and the rudiments of Latin, by the master, called the master of the lower school; and that all the rest of the scholars were instructed in classes in the learned languages, according to their proficiency, by the high master and usher and their assistants, in the said higher school, and also had the opportunity of receiving instructions in writing, arithmetic, and the lower branches of mathematics, but that a charge was made for such of the said scholars in both the higher and lower school, as were instructed in writing, arithmetic, and the mathematics, such instruction not having been considered to be within the strict object of a grammar school.

And the Master further found (which was afterwards confirmed by the Court), that the then present school-house, or some other house, should be appropriated to the use of the high master and his assistant, and the usher and his assistant, and in which the learned languages should be taught gratuitously by the high master, usher, and their assistants; that the trustees should provide rooms, to be called the lower school for the use of the master of the lower school, and which should be appropriated to the gratuitous instruction of the scholars that should require it, in the rudiments of the English language and

writing, and in the fundamental rules of arithmetic; and that the lower school should be conducted by the master of the lower school, and such assistants as from time to time the warden of the college of Manchester, or his deputy, and the high master, should think necessary or proper; that the trustees should provide a writing-master, who should instruct all the scholars attending at the Manchester Free Grammar School, except such as might be in the lower school; that the trustees should also provide rooms to be appropriated to the affording gratuitous instruction in the higher branches of arithmetic and the mathematics, and should provide other school-rooms to be appropriated to gratuitous instruction in good English literature, and in the French and other modern languages, as the warden or his deputy and high master should think proper, and masters provided accordingly; that the whole of the before-mentioned rooms should be considered as one connected establishment with and be called the "Manchester Free Grammar School;" that all boys of the age of six years should be eligible to become scholars of the school, and should be allowed to continue thereat up to the age of twenty years; that the high master should receive an annual salary, not exceeding 600*l.*, and should be provided with the use of a house contiguous to the school, rent free, and should have the privilege of receiving a number of boarders, not exceeding twenty, into his house; and that the usher should receive an annual salary, not exceeding 300*l.*, and should be provided with the use of a house, rent free, and have the privilege of receiving any number of boarders, not exceeding fifteen, into his house; and that the assistant of the high master should yearly receive a salary, not exceeding 200*l.*, and should have the privilege of receiving any number, not exceeding twelve boarders, into his house; that the assistant of the usher should receive a salary, not exceeding 150*l.*, and should have the privilege of receiving any number of boarders, not exceeding ten, into his house; that the master of the lower school, the writing master, mathematical master, and master in general literature and foreign languages, should have the

respective salaries (none of them exceeding 200*l.*) therein mentioned; that the scholars of the Manchester Grammar School should be entitled gratuitously to receive all or any part of the instruction directed to be given at the said school; that an annual examination should take place in one of the school-rooms of the scholars comprised in such of the classes of the school as the trustees, or the major part of them, should appoint, and that three examiners should be appointed for the purpose, who should be masters of arts or bachelors of civil law, of not less than two years standing at and resident members of one of the Universities of Oxford or Cambridge; that such examiners should examine the classes of scholars and ascertain the proficiency of the scholars, and that premiums, not exceeding in the whole 50*l.*, should be given to the greatest proficient; and that twelve exhibitions of 60*l.* each per annum for four years, should be awarded to such of the scholars found best qualified, and going to reside at either of the universities; that for the purpose of providing the requisite additional accommodation of school-rooms, library, masters' rooms, &c., in order to carry the proposed extended system of education into effect, it was desirable that the present high master's house and three several houses and shops adjoining should be taken down, and a new dwelling-house for the high master, and offices, and a commodious school-house, two school-rooms, library, and masters' rooms, &c., erected at an expense not exceeding 10,000*l.*; that the trustees, attending any meetings to be held touching any matter connected with the school, should have power, from time to time, to alter or vary the existing statutes, or any of them, and to make fresh statutes respecting the order, government, and direction of the school, and the mode of education and instruction to be adopted in the school, and generally to exercise all or any other matter or thing, which the trustees, or the major part of them, might consider expedient for the due management of the said school, and which might not be inconsistent with the statutes, and with the general objects proposed to be carried into effect by the scheme.

The Master's report was confirmed by the Court on the 6th of August 1833, and it was declared by the Court, that the scheme set forth by the Master in his report, for the future management and regulation of the Free Grammar School should be established; and it was ordered, that the trustees should proceed in the erection of the houses, school-rooms, &c. The proceedings under the petition (save in as far as his Majesty's then Attorney General gave his formal and official sanction to the presenting of the petition as required by the before-mentioned act of parliament, 52 Geo. 3.) were taken in the absence of the Attorney General, and the scheme was never submitted to him for his consent and approval.

An information was filed in May 1836, at the relation of several of the inhabitants of the town of Manchester, which, after detailing (*inter alia*) the facts and circumstances hereinbefore set forth, prayed that an account might be taken of the charity estates, and the revenues thereof, and of the manner in which the same had been applied; and that a scheme might be settled for the permanent administration of the charity estates, and for the conduct, discipline, and studies of the school, having regard to the altered habits of the times, and to the greatly augmented value of the charity estates, and the exigencies of the inhabitants of Manchester; and that it might be declared that it was for the benefit of the charity that the trustees should be residents in the town of Manchester; and that a reference might be directed to ascertain whether it would be proper that any of the present trustees should be removed; and that the several defendants might be enjoined from further carrying into execution the order of the 6th of August 1833, and the scheme thereby confirmed.

Mr. Wigram, Mr. Anderdon, and Mr. Mylne, in support of the information, contended, that all the proceedings which took place before the Master, under the petition presented by the warden, president, high master, and others, under the statute 52 Geo. 3. c. 101, were clearly wrong, and ought to be of none effect, the Attorney General never having attended any of them: that the interests of

the inhabitants of the town of Manchester were not represented before the Master: that the expenditure of large sums of money, amounting to 10,000*l.*, in erecting a house, outbuildings, and offices, of unnecessary size, for the high master, and the sanctioning the high master, usher, and assistant masters to take boarders, was repugnant to the acts and ordinances relating to the school, and injurious to the interests of such of the scholars as were resident in the town of Manchester, and for whom principally, if not exclusively, the school was founded: that the objects of the founders of the school were the poorer classes of the town of Manchester, and not individuals resident at a distance therefrom, many of whom were the children of wealthy parents: that the intention of the founders was to provide the most elementary instruction in the English tongue, for children of tender years, and not to confine the instruction to the learned languages: that almost all the present trustees were either not resident in the town of Manchester, or had no connexion therewith; and therefore ought to be removed from acting as trustees, as having been appointed in direct contravention of the statutes relating to the charity.

Sir Charles Wetherell, Mr. Jacob, and Mr. Bagshawe, for the trustees, contended, that the dates of the different proceedings were important, and the defendants ought to have the same benefit afforded them, as if they had pleaded or demurred to the information: that there had been no secrecy in the proceedings of the defendants, for in October 1833 the proceedings of the charity commissioners were advertised, and the scheme in question published in two Manchester newspapers about the same time; and in April 1834, a memorial was addressed, by some of the townspeople, to one of the trustees, praying an extension of the benefits of the charity; the master's house and other buildings were at that very time being erected, and yet not the slightest complaint was made thereof in the memorial: that the present proceeding was novel, and an attempt altogether to supersede the act 52 Geo. 3. c. 101: that instead of the present information being filed, a new petition ought to have been presented under that act: that the relators

knew the fact of there being boarders in the high master's and usher's houses, and they were also apprised of that fact at an early period by the charity commissioners' report: that there had been no undue haste in the proceedings before the Master, under the 52 Geo. 3. c. 101, which had been carried on regularly: that the new scheme restricted the master's authority, instead of extending it, as it ought to do; that the A, B, C clause, mentioned in the statutes, meant merely a book, and nothing more, and existed in the case of *The Attorney General v. Earl Mansfield* (1): that English literature could only be taught mediatively, and not *quâ* English literature, the Manchester school being clearly intended only as a school for instruction in the learned languages, by progress in which the scholars might be fit candidates for the exhibitions to the English Universities—*The Attorney General v. Dixie* (2): that the practice of taking boarders had long existed, and that nothing was more proper than that the scholars should be under the care and immediate controul of the masters: that although the trustees were not resident in the town of Manchester, they were sufficiently near to discharge their duties conveniently: that part of the scheme proposed by the relators could not be carried into effect, without reversing many of the most valuable decisions of eminent Judges who had presided in the Court of Chancery.

Mr. G. Turner appeared for the President of Corpus Christi College and Warden of the College of Manchester.

Mr. G. Richards and *Mr. J. Russell* appeared for the high master and other subordinate masters.

Other cases cited were—

The Attorney General v. Whiteley, 11 Ves. 241.

The Attorney General v. Hartley, 2 Jac. & Walk. 353.

The Attorney General v. the Coopers' Company, 19 Ves. 187.

The Attorney General v. Christ Church, Jac. 474.

(1) 2 Russ. 50.

(2) 3 Russ. 534, n.

The Attorney General v. the Skinners' Company, Jac. 629.

The Attorney General v. the Earl of Clarendon, 17 Ves. 491, 505.

The Corporation of Ludlow v. Greenhouse, 1 Bl. (n.s.) 17.

THE LORD CHANCELLOR.—I consider this case as one of the very first importance, as it relates to the due application of very large funds to the object of education, in so populous and important a town as Manchester. I find this school specially excepted from the operation of the act of last session, which extends the powers hitherto exercised by this Court in cases of grammar schools; but, fortunately, there are in this case circumstances and peculiarities which prevent that exception from being so injurious to the town as it otherwise might have been. It is impossible to look at the instruments upon which the establishment of this school is founded, without being satisfied that it was intended to be what is technically called a grammar school; but there is, fortunately, in these instruments sufficient to relieve it from the operation of those decisions in which, I think, this Court has unnecessarily restricted the meaning of that term within the narrowest limits. And in cases in which a part of the founder's property has become disposable, from the whole of his objects being satisfied with part, it seems to have lost sight of the doctrine of *cy pres*, under which it familiarly administers the whole or part of his property which has become disposable, his object having failed. Later cases, however, have departed from the strictness of these decisions. The founders of this charity have made provisions which prove that they considered (what might perhaps have been, in some cases, assumed), that there was nothing inconsistent with the object of teaching the learned languages. The statute of the 16 Hen. 8. provides for the teaching of all infants that shall come to school, "their A, B, C, primer and sorts, till they be in grammar;" and it also wisely provides, in these terms—"Because in time to come many things may and shall survive and grow by sundry occasions and causes, which, at the making of these acts and ordinances, it was not possible to come to

mind; the feoffees are therefore authorized, from time to time, when need shall require, to call in to their aid learned counsel and men of good literature, to have full power and authority to augment, increase, expound, and perform all the said acts and ordinances, articles, compositions, and agreements concerning the schoolmaster, usher, and scholars, for their and every of their offices concerning the said free school." This power, wisely given to the Court, the Court will, if necessary, exercise for the benefit of the objects of the testator's bounty. These provisions of the statute, together with the course which has been followed in this charity, and the scheme sanctioned by the Court in 1833, of which no complaint has been made as being too extensive, and which the defendants insist ought to be conclusive and binding, relieve me from the necessity of reviewing the doctrine of some of those authorities in this case, and the beneficial provisions of the act of last session will probably render it unnecessary in any other. What I have to consider is, whether there has been made out on this information sufficient grounds for this Court to decree all or any of the subjects of relief asked at the bar, viz. first, to have the accounts taken; secondly, to remove the existing trustees; thirdly, to send a reference to the Master to approve of a new scheme for the application of the income of the charity property. I am of opinion, that no case has been made for a decree to take the accounts. The statutes prescribe the mode in which the receiver's accounts are to be settled, and there is no allegation or proof in support of any case of neglect or error in the performance of that duty. In the absence of such proof, I must assume that the parties, to whom this duty is assigned, have faithfully performed it. To decree the account, under such circumstances, would be to expose every charity estate to the expense of a suit, whenever any person should for any reason ask for an account in the form of an information. I am also of opinion, that, on the second head, I cannot make the decree prayed for. It is true, that the statutes direct that the feoffees, to be in future appointed, shall be honest gentlemen, and honest men, in some parish in Manches-

ter. This direction does not appear to have been followed; but the custom appears to have been to appoint the most eminent and distinguished persons in the neighbourhood to take the offices of feoffees and trustees; and the charity and the public are much indebted to those who have undertaken those offices, and contributed by their influence and support to the efficiency of the charity. Of this description are the present trustees, and of their conduct as such feoffees or trustees, no cause of complaint has been established; and I should much have regretted if I had found myself compelled, from any objection to their qualification, to remove them from those offices; feeling that, in so doing, I should in all probability be doing a real injury to the charity. In *The Attorney General v. Lord Clarendon*, it is evident, from the observations of Sir Wm. Grant, although the case before him was that of a corporation, that he would have thought it incumbent on the Court, in such a case as this, to have inquired into the original eligibility of the trustees: the question however is very different when the Court has to describe the course to be followed in future. The provisions of the statute are distinct on this subject, and I think they are founded on good sense; for however advantageous it may be that the charity should have the protection of the powerful and eminent aristocracy of the county and neighbourhood, there can be no doubt but that the trustees, residing within the parish, and personally interested in the welfare of the inhabitants of the town, would probably give a more regular and vigilant superintendence to the establishment. Perhaps a compound of the two would be the most desirable; but however that may be, I find a rule laid down by the statute, from which I do not find any reason to depart, but, on the contrary, although at the date of the statutes there may have been some difficulty in finding proper persons to fill the office within the parish, it is certain that the only difficulty now will be in the selection from amongst the many who possess all the qualifications that can be desired.

The most important subject of the plan for the future management of the charity remains to be considered. And here the

only difficulty exists in the form of the proceedings of 1833. On the part of the defendants it was contended, that these proceedings ought to be treated as conclusive, and as excluding all investigation on the present information; whilst, on the part of the Attorney General (for I cannot for this purpose consider the relators as parties to the litigation), it was insisted that these proceedings were to be altogether disregarded as *ex parte*. I cannot adopt altogether either of these propositions. That the proceedings were *ex parte*, there can be no doubt. The order, the report, the affidavits on which the Master made his report, clearly prove that.

The Attorney General does not appear to have been a party to the proceedings in the Master's office, which of itself, in my opinion, deprives them of the value which might otherwise attach to them. Sir John Leach held, that the Attorney General ought always to be a party in the inquiries under such references. I had hoped that such had since that time been the universal course, and I trust it will be so for the future. If, under Sir Samuel Romilly's Act, any party may *ex parte* obtain the Master's sanction to any scheme he may propose, and the order confirming the report is to preclude future investigation, that act will produce much more mischief than, if properly acted upon, it is calculated to do good. The order, on petitions under the act, cannot be obtained without the sanction of the Attorney General. The law, therefore, requires that he should be a party to the representation to the Court, that a grievance exists, which the interests of the public require should be redressed. But if he is not to intervene in the inquiry, as to the particulars of such grievance, or in the consideration of the proper remedy to be applied; and if such inquiry and consideration are to be left to the conduct of parties who may have private interests to promote, not only will no protection be afforded to the public interest, but the apparent sanction of the Court will be given in many cases to pre-existing or newly conceived abuses. If I find that it is the practice, in any of the Master's offices, to proceed upon these references in the absence of the Attorney General, it will be necessary to make a

general order to correct such practices. Some cases were referred to, in which the provisions of the acts, as to appeals from former orders, which had been made under it, were discussed. Such cases have no application to an information by the Attorney General, complaining of a scheme adopted on a report under this act in his absence. But although I am of opinion, that such proceedings cannot be a bar to any well founded complaint by the Attorney General, on behalf of the public, I do not consider it necessary, because I do not think it would be just, or for the interest of the public, that such proceedings should be treated altogether as a nullity. Much money has been expended, and many new interests may have been created under the directions of the order of 1833. These payments, and these interests, the Court is bound, as far as possible, to protect; and although I find in the scheme so adopted by the Court much to object to, yet I find in it much that I fully approve. The course, therefore, which I think this Court ought now to follow, is to adopt so much of that scheme as is worthy of being retained, and to correct so much of it as may appear open to objection; and the proper way of effecting that object will, I think, be to send it to the Master, with certain directions, some of which will be for the purpose of giving to the Attorney General an opportunity of bringing forward such suggestions as the interests of the public and the charity may appear to require, and others of which applying to subjects now ready for decision, will be declarations of opinion of the Court upon those points.

Of these, the most important is that of the boarders resident in the houses of the head and other masters. There have been many cases in which this practice has been discussed, and allowed by the Court—whether wisely or not, may, as to some of them, be questioned; but there is no doubt as to the principle upon which the Court has in all of them acted, and which alone could have justified the permission granted. In all the cases, the object of the foundation, and the purposes of the trust to be performed, being the gratuitous education of the objects of the charity, the Court would not have been justified in

granting this permission to the masters, except on the conviction, that the purposes of the charity would not be prejudiced by the exercise of it.

In some it has been thought, that the purposes of the charity were likely to be advanced by it, as, where the funds of the charity were very small, it has been supposed that, by opening an additional source of revenue to the masters, persons might be induced to accept the office who would have declined to perform the duty for the small salary which the funds of the charity would afford. Such cases can have no application to the present, in which the income, in 1833, was 4,550*l.*, and the salary awarded to the head master was 600*l.* per annum; and the salaries of all the masters together was 2,050*l.*, whilst the number of boys, including boarders, was only 198. It is, I think, impossible, on any principle, or on any authority, to justify that part of the scheme approved in 1833, which relates to this subject. I find an expenditure of 10,000*l.* of the charity funds sanctioned, of which a considerable part would not have been required for the purposes of the charity, or for any purpose but the accommodation of the boarders in the master's house. If there were not special circumstances in the case of the *Rugby school*, as stated by Sir Wm. Grant, and the case of *Harrow School* (3), I can only say, that I cannot understand on what principle Lord Eldon got over the (in my opinion) well-founded objections of the Master to the expenditure proposed; nor can I reconcile what is stated to have been done in that case, with the principle laid down and acted upon by the same learned Judge in *The Attorney General v. the Cooper's Company* (4). Of the sum so to be expended, 4,450*l.* was for rebuilding the master's house, which was to contain accommodation for twenty boarders, including various rooms exclusively for their use. Unfortunately, this money has been expended, the buildings have been erected; and I am to say what shall be the future rule on this subject, in the application of the funds of a charity, of which part is now invested in the buildings so adapted to these purposes. It appears,

also, that the permission to the master to take boarders has long existed; and no doubt those who at present exercise the duties of masters accepted their offices in the expectation that such permission would be continued for the future. I am anxious, as far as possible, consistently with the interests of the charity, not to disappoint expectations so naturally excited, or to do any injury to the interests of these gentlemen; but I am, in the first instance, and in preference to all other considerations, bound to guard the interests of the charity from injury, and its funds from misapplication. Any provisions, therefore, of the scheme adopted in 1833, which may possibly have the effect of applying, in future, part of the funds of the charity for the benefit of the boarders in the houses of the masters, which can now be corrected, must be altered; and I find several of that description. The boys so boarded in the masters' houses cannot be considered as in any respect objects of the charity. From the scholars of the charity the masters are by the statute prohibited from taking any payment or any reward beyond their stipend. The boarders cannot be considered as scholars of the charity, for the purpose of participating in its funds without submitting to the provisions required by the statutes; and yet I find, by the scheme of 1833, that the funds of the charity are applied, not only in providing premiums for such boarders, as well as for the free scholars, but that they are made eligible for exhibitions. The result appears to have been what might have been expected. Of twelve exhibitions, from 1833 to 1836, both inclusive, eight have been given to the boarders and four to day scholars; and from 1807 to 1836, fifty-seven to boarders and twenty-eight to day scholars. It was observed, the head master and the feoffees appoint the two examiners; and that the head masters and the wardens select, from among the boys reported to be qualified, those to whom exhibitions are to be given. I will not suppose there has been any partiality in these selections, but the giving premiums and exhibitions to the boarders is not only a misapplication of the charity funds, but the day scholars have not even a fair chance in the competition with strangers

(3) *The Attorney General v. the Earl of Clarendon*, 17 Ves. 491.

(4) 19 Ves. 191.

for the prizes, which are intended exclusively for themselves. The superior advantages of the boarders, from the constant and comparatively exclusive attention of the masters, must give them acquirements superior to the poor day boys. These misapplications of the charity funds, in favour of the boarders, are so obvious, that I purpose making them the subject of a declaration in the decree; and there may be others. If, for instance, the various masters, now appointed, receive out of the charity fund larger payments than they would require, if their instructions were confined to the day boys, the excess is a misapplication of the charity fund. This and any similar cases must be the subject of inquiry before the Master. I also think that part of the scheme, which excludes from the school all children under six years, is inconsistent with the statutes, which, in providing for the teaching of all infants who should come to school to learn their A, B, C, and primer, clearly intended that the doors should be open to all children capable of any instruction. I must also observe, that the statutes point out the proper application of any surplus of the charity income, namely, in exhibitions to scholars who have been brought up at the school; that the scheme of 1833, although it had to dispose of the surplus of 2,000*l.* per annum, made no addition to the previously existing exhibitions of twelve of 60*l.* each.

Having felt called upon to make these observations on some of the provisions of the scheme, I am happy in expressing my approbation of the general spirit of the system of instruction proposed. The object of the provision, in this respect, is to preserve the integrity of the establishment as a grammar school, but to introduce all such other branches of instruction as may be useful to those who seek the benefit of the founder's bounty; and as the funds are ample for that purpose, the object ought to be so to apply them as to afford to the inhabitants of Manchester the means of gratuitous instruction to their children, in all branches of learning and information, which may be most likely to be beneficial to them; and such, I conceive, was the object of the scheme adopted in 1833, and to which, in that respect, no well-

founded objection can, I think, be made. But the Attorney General ought not, I think, to be precluded from offering any such suggestions.

I propose therefore to declare, that in all future appointments of feoffees and trustees, regard should be had to the qualification required by the statutes; that all children, of an age capable of instruction, are entitled to be admitted into the school; that no part of the funds of the charity are hereafter to be applied towards paying premiums for exhibition to boys who are, or have been, boarders in the house of any of the masters, except in continuing to pay exhibitions already granted; and that such boarders are not in future to derive any benefit from the funds of the charity, in any manner by which the expenditure of such funds may be increased: and with these declarations I shall refer it to the Master to approve of such alterations in the scheme contained in the report of 1833, as may be necessary to carry the same into effect, and as the Master shall find to be proper, for the purpose of more effectually carrying into effect the objects of the charity; regard being had to the present amount and particulars of the property of such charity, and the existing circumstances of the town and neighbourhood of Manchester.

V.C. }
Nov. 16. } SEDDON v. EVANS.

Practice.—Demurrer—Liberty to amend—Dismissal for want of Prosecution.

The effect of allowing a demurrer, and giving the plaintiff by the same order liberty to amend the bill, is that the suit remains a pending suit; and notwithstanding the plaintiff pay the costs of the demurrer, yet, if he do not amend, the defendant may dismiss the bill with costs, for want of prosecution.

The demurrer of the defendant having been allowed, and liberty given to the plaintiff to amend (1), the order was drawn up, adding, according to the terms of the 14th general order of 1828, the plaintiff

(1) See 9 Law J. Rep. (N.S.) Chanc. 341.

"undertaking to amend within three weeks," or in default thereof the order to be void. The plaintiff did not amend; and a motion was now made on behalf of the defendant, that the bill might be dismissed with costs for want of prosecution.

Mr. Jacob, for the motion. — By the former order, the defendant only has the costs of the demurrer. The suit remains a pending suit, and must be liable to dismissal on the ordinary ground.

Mr. Stuart, for the plaintiff. — The defendant has been paid the taxed costs of the demurrer, which is all he would have been entitled to, if liberty had not been given to amend the bill. The plaintiff has not thought proper to avail himself of that leave; but is he to pay more costs merely because the leave was given? The form of the order brings it under the 14th general order, and the only consequence of not amending at the utmost is, that the leave fails, the condition not having been fulfilled.

The VICE CHANCELLOR. — I should have thought that the proper form of order would have been, to add to the undertaking, "and if the plaintiff does not amend within three weeks, then the bill to be dismissed with costs." The registrar however tells me, that is never done. It is plain the suit remains a pending suit, and if the plaintiff does not amend, the defendant would never have the costs of the suit, beyond the costs of the demurrer. It appears to me, that I must make the order for the dismissal of the bill, with costs.

Order accordingly.

V.C. }
Nov. 18. } PIPER v. GITTENS.

Practice. — Costs — Tender — Motion to dismiss Bill.

A, having received notice of motion to dismiss, filed a replication, and tendered 20s. costs to B. B requested time, and the whole of the day was given him to accept or refuse the tender. B gave no answer till the following morning, which was the motion day. A delivered his brief on the motion after

eight o'clock on the preceding evening: — Held, that the extra costs must be borne by B.

The defendant's solicitor, on the 25th of July, gave notice of motion, for the ensuing seal day, which was the 29th of July, to dismiss the bill for want of prosecution. The plaintiff's solicitor filed a replication on the 27th of July, and on the morning of the 28th tendered to the defendant's solicitor 20s., as costs of the motion. The clerk of the defendant's solicitor requested that some time might be given him to inquire as to the propriety of accepting the costs tendered; and the whole of the day was given him for that purpose. No answer having been made at eight o'clock in the evening of the 28th, the plaintiff's solicitor prepared and delivered his brief to counsel, with instructions to appear on the motion.

On the morning of the 29th, at ten o'clock, the defendant's solicitor signified that he would accept the costs tendered, but he was then informed that it was too late, inasmuch as counsel had been instructed on the preceding evening.

Mr. L. Lowndes, on behalf of the defendant, in support of the motion, submitted that the costs should be borne by the plaintiff; first, because his solicitor had been precipitate in delivering his briefs before the expiration of the day which had been allowed for consideration; and, secondly, that he ought to have paid the 20s. when the defendant's solicitor offered to accept it, and to have demanded payment of the extra costs he had incurred; and not having done so, the defendant was compelled to proceed with the motion.

Mr. K. Bruce, *contra*, cited *Turner v. White* (1).

The VICE CHANCELLOR said, that the plaintiff was right in instructing his counsel to appear, after waiting until eight o'clock, the following day being the seal; and he ordered that the defendant should pay the costs of the motion, the 20s. being set off against them.

(1) V.C. April 9, 1839, where the like order was made. *Mr. K. Bruce*, for the motion. *Mr. Stuart*, *contra*.

M.R. }
Dec. 8. } HOPE v. HOPE.

Practice.—Irregularity of Order—Examination de bene esse—Notice of Motion.

An order directing the examination of a person de bene esse as a witness, he alone being able to depose to particular facts in the cause, is irregular, if made ex parte.

Semble—That in such cases it must be shewn, that the particular person proposed to be examined de bene esse knows the facts touching which he is to be examined, and is the only person who knows them.

In this case, an order had been obtained on behalf of the plaintiff, dated the 7th of September 1840, for the examination *de bene esse* of a person of the name of Bram Hertz, as a witness for the plaintiff in the cause, saving all just exceptions. The order was obtained *ex parte* on an affidavit of the plaintiff's solicitor, stating that the cause had been instituted for the administration of the estate and effects of Henry Philip Hope, the testator in the pleadings named, and particularly for trying the validity of a deed of gift, dated the 9th of April 1838, and made between the said H. P. Hope of the one part, and the plaintiff of the other part, whereby H. P. Hope gave to the plaintiff certain diamonds, precious stones, jewels, gems, and minerals, contained, on the 9th of April 1838, in a mahogany cabinet mentioned in the deed; and further stating, that he, the plaintiff's solicitor, had been informed and verily believed, that the said Bram Hertz was a person of skill and knowledge in diamonds, precious stones, jewels, gems, and minerals; that Bram Hertz was intimately acquainted with the testator, for ten years previously to his death, and was employed and consulted by the testator, with reference to the collection of diamonds and precious stones formed by him, and had arranged a catalogue descriptive of the diamonds, &c. contained in the cabinet, under the testator's immediate direction; that Bram Hertz knew what diamonds, &c. were in the cabinet on the 9th of April 1838; that it was essentially necessary to the case of the plaintiff, to shew what diamonds and precious stones, &c. were in the cabinet on such day, and

to identify such of the diamonds, &c. then in the possession of the defendants, the executors of the testator, in England, as were contained in the cabinet on such day, and to shew the *intention and views* of the testator, in executing the deed of gift on the 9th of April 1838. The affidavit further stated, that to the best of deponent's knowledge, information, and belief, Bram Hertz was the only person who could depose to the several matters thereinbefore mentioned as essentially necessary to the case of the plaintiff, and that such matters were in the knowledge of Bram Hertz only.

A motion was now made on behalf of Andrew Thomas Hope, one of the defendants to the suit, to discharge the order so obtained.

Mr. Turner and *Mr. Bailey*, in support of the motion, argued to the following effect—viz. that the order obtained was of too extensive a nature, and could not stand; that the Court looked at applications of this kind with some jealousy, because a person when examined *de bene esse* considered himself afterwards pledged to adhere to the evidence given by him; that Lord Eldon, in the case of *Bellamy v. Jones* (1), stated, that in the case of an application to examine a person as a witness *de bene esse*, it must be shewn that he is the only witness to the facts respecting which he is intended to be examined; and the Court must be satisfied that such is the case; that Lord Eldon's observations in *Rome v.* — (2), were to that effect; that an examination as to the "views and intentions of the testator," was too general in its nature, and it would be impossible for a defendant to know how to regulate his cross-examination of the witness, as to the views and intentions of the testator; that in *Pearson v. Ward* (3), the affidavit was considered insufficient, because it did not particularize the evidence intended to be given; that the order obtained in the present case was too unlimited in its terms, and ought not to have been obtained without previous notice to the defendants in the cause; and that in the cases of *Shelley v.* — (4),

(1) 8 Ves. 31.
(2) 13 Ves. 261.
(3) 1 Cox, 177.
(4) 13 Ves. 56.

Pearson v. Ward, and *Frere v. Green* (5), the orders were made by the Court upon notice; and that a contrary practice would be against all principle.

Mr. Pemberton and *Mr. Gardiner*, for the other defendants in the cause, insisted on the great danger that would arise in cases like the present, where the order made is so general and unlimited in its terms, and that notice of the application to the Court was necessary—*Newland's Practice in Chancery*, vol. 1, p. 452.

Mr. Tinney and *Mr. Hislop Clark*, in support of the order, contended, that the plaintiff, in obtaining the order, had followed the practice as it was laid down in the books recently published; that in the 2nd vol. of *Daniel's Chanc. Prac.* 547, it was stated, that in cases like the present, no notice was necessary—*M'Kenna v. Everitt* (6); that the orders heretofore made in such cases were quite general in their nature, and no precedent could be found to the contrary; that the solicitor of the plaintiff, in support of the application, had sworn to the best of his knowledge, information, and belief, that *Bram Hertz* was the only person who could depose to the essential facts of the case, and that such facts were in the knowledge of *Bram Hertz* only; and that ought to be considered satisfactory.

THE MASTER OF THE ROLLS.—This was a motion to discharge an order which was obtained for the examination of a witness *de bene esse*, on the ground of irregularity; and several objections were stated against such order: and the first was, that no notice was given to the other parties of the application for the order; secondly, that the affidavit in support of the application was insufficient, as it did not thereby appear that the person mentioned in the affidavit was the sole witness to the facts, touching which it was proposed to examine him; thirdly, that it was not shewn to what particular facts the witness was to be examined; and fourthly, that leave was given in too general terms to examine the witness. In *Hankin v. Middleditch* (7), an order was made *ex parte*, that a witness should be

examined *de bene esse*, the affidavit in support of the application stating, that he was the only witness to a fact material to the cause; but the age of the witness was not sworn to. In the several cases of *Shirley v. Ferrers* (8), *Pearson v. Ward*, and *Brydges v. Hatch* (9), a witness was ordered to be examined *de bene esse*, on the ground of his being the only person in whose knowledge material facts were, and in the two former cases, the orders were made on notice; the practice, however, has been for some time past to draw up orders of this nature as of course; and so the practice was understood to be by *Sir J. Leach*, in the case of *Tomkins v. Harrison* (10), and by me in *M'Kenna v. Everitt*. No case, however, is to be found, in which the question has been decided after discussion, whether the order ought or not to be made *ex parte*; and I have now to determine that point. It appears, from the different cases on the subject, except that of *Hankin v. Middleditch*, in which the order was made *ex parte*, that there was risk of the loss of the evidence, unless the examination was taken very speedily; and my opinion is, that the order ought to be made only on notice of motion, notwithstanding the prevalent practice to the contrary. The affidavit, moreover, filed by the plaintiff's solicitor, in support of the motion is, I consider, insufficient, on the authority of *Rome v. —*; but the plaintiff may move, on notice, to examine the witness, and it will be then for the consideration of the Court, whether the order shall be general in its nature, or restricted to particular matters in issue. The order made must be discharged; but, under the circumstances of the case, without costs.

V.C. }
Dec. 9. } BROOM v. SUMMERS.

Injunction—Trustee and Cestui que trust
—*Identity of a Congregation or Society.*

A trust was created of certain premises
“for the use of a congregation of Protestant Dissenters of the Presbyterian Persuasion,

(5) 19 Ves. 319.

(6) 3 Beav. 188; s. c. 9 Law J. Rep. (N.S.) Chanc. 96.

(7) 3 Bro. C.C. 641.

(8) 3 P. Wms. 77.

(9) 1 Cox, 423.

(10) 6 Mad. 315.

who then occasionally met at a house belonging to J. A." At that time, the congregation were in connexion with and subject to the disciplinary jurisdiction of a certain Presbytery and Synod. The minister and part of the congregation subsequently seceded from that connexion and jurisdiction. The trustees thereupon brought ejectment against the minister, who retained possession of the premises, and he obtained the common injunction restraining the action until answer:—Held, that the seceding parties did not constitute the congregation for which the trust was created, and that the injunction must be dissolved.

In 1808, a plot of ground was demised by lease to certain trustees, upon trust for the use and behoof of themselves, and the rest of a number of persons styled "The Congregation of Protestant Dissenters of the Presbyterian Persuasion, who then occasionally met at a house belonging to John Anderson, at Sunderland," upon trust, that the same premises should, during the said term, be used and occupied as a meeting-house or place of worship for the said congregation of Protestant Dissenters, and for no other use; and during the building of the chapel, the said congregation joined themselves to the "United Associate Presbytery of Coldstream and Berwick." In 1815, another plot of ground was demised to the same trustees, upon which a house for the minister of the same congregation was built.

Andrew Broom, the plaintiff, was, by a majority, chosen minister of the congregation in 1833. In 1835, disputes arose between Broom and some of the congregation, and complaints respecting him were brought before the Presbytery of Coldstream and Berwick, who summoned and reprimanded him. Broom appealed to a body called a "Synod," who appointed the record of the Presbytery to be deleted. Subsequent proceedings were taken in the Presbytery, in reference to complaints of some members of the congregation, of the plaintiff's conduct and discourses, but the plaintiff did not attend the summons, or submit to the authority of the Presbytery; and pending those proceedings, at a congregational meeting, the plaintiff and 330 members and seat-holders, out of 412, of which

the congregation consisted, agreed to leave the said Presbytery and Synod, and join themselves to another body; and, accordingly, the plaintiff and 330 members left the Presbytery of Coldstream and Berwick, and joined the Presbytery of the North West of Northumberland, the religious doctrines and form of worship of which were said to be the same as those of the body they left; but the society called the "Presbytery of the North West of Northumberland," had no connexion with any synod; assumed no power over the members of the societies in connexion with it; and had no authority to remove the plaintiff from his office, whatever grounds of complaint against him might appear. The premises were at this time vested in the defendants Summers and M'Dougale, as trustees. Summers, and about eighty of the congregation left the remainder of the members of it, at the time of the change of connexion, and the Coldstream and Berwick Society appointed them a preacher. Summers and M'Dougale having brought two actions of ejectment against Broom to recover possession of the chapel and dwelling-house, he filed his bill, praying for the appointment of new trustees, and that the defendants might be restrained from proceeding in the actions of ejectment.

The common injunction was obtained. On the answer being put in,—

Mr. Jacob and Mr. Purvis, on behalf of the plaintiff, shewed cause against dissolving the injunction.

Mr. K. Bruce and Mr. S. Atkinson, for the defendants, were not heard.

THE VICE CHANCELLOR.—The question upon this answer is, whether it must be taken that those persons who have seceded from that kind of ecclesiastical jurisdiction to which they were subject at the time these leases were granted, are the congregation for whose benefit the premises were demised. It appears by the answer that the secession church, to which this congregation belonged, always acted upon the system of doctrine and discipline of the Church of Scotland, and that they were governed by a kirk session, consisting of a Presbytery and a Synod, and that this was the discipline of the society of persons constituting this congregation at the time

the leases were made. It appears, that since that time, Mr. Broom, the minister, and a number of other persons, have severed themselves from those of the congregation who still adhere to that mode of church government. It seems to me to be plain, that the plaintiff, and those who have thus departed from the connexion which existed at the date of the lease, do not compose the congregation described in it, for whose use the premises were to be held. They are not a congregation of Presbyterians of the established church of Scotland, and they have seceded from the secession church to which the congregation mentioned in the lease belonged.

Injunction dissolved.

V.C. { PRESTON v. GUYON.
Dec. 8, 10, 21. { SAME v. HALL.

Joint-stock Company—Liability of Trustees of Shares—Duty of Directors to make Calls on all Shares equally—Demurrer.

The directors of a joint-stock company, in order to procure their act of parliament, subscribed for a large number of shares, and signed a declaration that they held them in trust for the company, but did not pay the deposit on, or register them. Afterwards, at a special general meeting of the company, it was resolved that the trust should be annulled, and the shares transferred to the secretary, to be held by him at the disposal of the board. The directors then proceeded to make calls on the registered shares:—Held, on demurrer, that the said directors were primarily liable in respect of the shares subscribed for in trust for the company, as any other trustee would be, although they might be entitled to indemnity from their cestui que trust.

That they were not relieved from such liability by the proceeding taken to annul the trust and transfer the shares.

That it was the duty of the directors to make the calls in respect of all such shares, equally with the calls on the registered shares; and that the Court would compel the directors to put all the shareholders on an equal footing according to their proportions, with respect to the calls to be made upon them.

NEW SERIES, X.—CHANC.

The bill was filed by the plaintiff, on behalf of himself and all other the subscribers to and members of the Grand Collier Dock Company, not parties defendants, against the body corporate, styled "The Grand Collier Dock Company," and against J. Guyon, W. Gunstone, W. J. Richardson, H. Luard, J. H. Ritchie, J. Heygate, C. Duncan, and Sir W. Heygate, the directors of the company, J. Smith, the secretary, S. S. Hall and J. W. Hulme, two of the former directors, who were concerned in the transactions complained of, and Susan Gordon and R. N. Bennett, the personal representatives of A. Gordon, deceased. The bill stated, that in the year 1837 it was proposed to form a company for making docks at Rotherhithe and Deptford; and that two deeds were prepared, dated the 16th of February 1837; the first called the parliamentary deed, to which the said A. Gordon was party of the first part, J. S. Ledger of the second part, and the several subscribers thereto of the third part, whereby Gordon, for himself, his heirs, executors, administrators, and assigns, covenanted with and to Ledger, his executors and administrators, and Ledger, and each of the several parties of the third part, for himself and his heirs, executors, administrators, and assigns, covenanted with and to Gordon, his executors and administrators, that the said several parties had subscribed the sums set opposite to their respective names for the purposes contemplated, and would well and truly pay, or cause to be paid, the amount subscribed by each of them respectively, within five years from the passing of the act, as the directors authorized by the act should direct. This indenture was executed by several persons, and, among others, by the plaintiff, for twenty shares. The second indenture, called the deed of management, was executed by twenty-nine persons for 255 shares, but not by the plaintiff; and this indenture, after prescribing the mode of management until an act of parliament should be obtained, and nominating the committee, provided that the capital of the company should be 550,000*l.*, divided into 11,000 shares of 50*l.* each, and that a deposit of 1*l.* per share should be paid at the time of subscribing. The bill was

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brought in and passed the House of Commons; the parliamentary deed not being then executed by more than thirty-four persons for 455 shares, forming a capital of 22,750*l.*, the seven first-named defendants, and the defendant Hall, being subscribers for certain shares each.

By the standing orders of the House of Lords, no bill for making canals, railways, docks, &c., can be read a third time unless four-fifths of the probable expense shall have been subscribed for by persons under a contract, binding them, their heirs, executors, and administrators, for payment of the money subscribed within a limited time, nor unless there shall be contained in such bill a provision that the whole of the probable expense of the works shall be subscribed before the powers and authorities, to be given by the bill, shall be put in force. The provisional committee, in order to comply with this standing order, after the bill had passed the House of Commons, continued their endeavours to obtain further subscribers, which they obtained to the number of 9,530 shares, of which the defendants Richardson, Luard, Gunston, J. Heygate, Ritchie, Hall, Guyon, and Duncan subscribed, in addition to their former subscriptions, for 1,000 shares each, and the defendant Hulme subscribed for 1,000 shares, making together an additional subscription for 476,500*l.*, and the said defendants duly executed the said parliamentary deed. In July 1837, the committee of the House of Lords reported that they had agreed to the bill, intituled, 'An Act for making wet docks and other works on the south side of the river Thames, at or near Rotherhithe or Deptford, in the counties of Surrey and Kent, to be called The Grand Collier Docks.'

The bill alleged, that this report was made upon the faith and confidence that the persons executing the parliamentary deed had *bond fide* subscribed for the shares set against their names; and the bill passed, and received the Royal assent on the 15th of July 1837. That the act, among other things, after reciting that whereas the probable expense of the works would amount to 550,000*l.*, three-fourths whereof had been already subscribed for by several persons under a contract, binding them-

selves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for, enacted, that the whole of the 550,000*l.* should be subscribed for before any of the compulsory powers thereby given for taking lands should be put in force: the act then prescribed the time and manner of calling and holding general meetings, and empowered ten or more proprietors, holding in the aggregate 1,000 shares or upwards, to require to be called, or themselves to call, special general meetings of the company; specified the number of votes the proprietors should have, not exceeding twenty each; regulated the manner in which the accounts and minutes of the company should be kept, and the register of shareholders should be made and sealed; the payment of calls enforced, and shares transferred, and declared to be forfeited. That the first general meeting was held on the 12th of January 1838, at which the said subscribing defendants and others attended, and some of the defendants voted as the *bond fide* holders of all the shares they had subscribed for; and if they had not done so, in respect of their said additional subscriptions, there would not have been proprietors of 1,000 shares present, and no business could, according to the act, have been done at the meeting: that Duncan, Guyon, Gunston, Hall, J. Heygate, Luard, Ritchie, Sir W. Heygate, F. Mangles, H. Nelson, and J. C. Ord, were chosen directors, of whom all except the three last named and Hall, still continued to be directors: that at a meeting of directors in May 1839, it was resolved, that the standing orders be suspended, and that every director and scrip-holder be requested to register his shares within a week, in obedience to which resolution, forty-eight members (and among others the plaintiff) registered their shares, which were numbered 1 to 605.

The bill stated, that the said additional subscribers (except Hulme) alleged that they affixed their names or initials to a memorandum, as follows:—"The shares subscribed for this day by the provisional committee are to be held in trust for the company, and to be allotted and sold only by a vote of the majority of the said provi-

sional committee similarly subscribing, all benefits and profits in any way arising from the allotting or sale of such shares to be held for the company, and not for the said subscribers. London, 4th of July 1837;" and that Hulme affixed his name to a similar memorandum on the 5th of July 1837: that pursuant to resolutions, passed by the directors on the 10th of June 1839, an entry was made in the register, to the effect that shares 1,001 to 9,000 were held in trust for the benefit of the company by the said memorandum of the 4th of July 1837: that a special general meeting of the company was holden on the 27th of June 1839, and a resolution was then carried unanimously, and entered on the books of the company: "that the trust entered into for the benefit of the company, by memorandum dated the 4th of July 1837, and on that day lodged in the hands of the solicitor of the company, by Messrs. Gunston, Richardson, Luard, Ritchie, J. Heygate, Guyon, Duncan, and Hall, be hereby annulled, and that the 8,000 shares so subscribed for and numbered 1,001 to 9,000 in the register share book of the company, be now transferred to J. Smith, the secretary of the company, to be issued from time to time for the use of the company, by a vote of the board."

The bill alleged, that the memorandum of the 4th of July 1837, and the resolutions and entries in the books, made on the 10th and 27th of June, were made by collusion, for the fraudulent purpose of relieving the eight defendants, who were then directors, from their liability to pay the deposit and the contemplated calls, and that they tended to deprive the other shareholders of the benefit of the subscriptions on the 8,000 shares; and it stated, that in pursuance of the same fraudulent purpose, some entry was made on the books, declaring that Hulme held the 1,000 shares numbered 9,501 to 10,500 in trust for the company: that on the 22nd of July 1839, another meeting of the directors was held, at which it was resolved that a call of 5*l.* per share should be made on the registered proprietors; only 605 shares having been then properly registered, and it being thereby intended to make the call on such 605 shares only, although the four directors, by whom the call was made, held an

additional 1,000 shares each, upon which they thus sought to avoid the payment of such call. The call was confirmed by another meeting of the directors on the 29th of July. That at an adjourned half-yearly general meeting of the company, held on the 27th of September 1839, at which seven of the said directors voted in respect of their said additional subscriptions, and without which there would not have been proprietors of 1,000 shares present, the resolution of the 27th of June, annulling the trust as to the 8,000 shares, was confirmed, and the trust, as to the 1,000 shares of Hulme, was in like manner annulled: that on the 28th of October 1839 another call of 2*l.* per share was made, both of which calls were paid by the plaintiff on his twenty shares, and by nearly the whole of the proprietors of the 605 shares, he and they being ignorant of the frauds and transactions aforesaid: that the plaintiff paid the calls of 5*l.* and 2*l.* per share on the said twenty shares, in the full faith and confidence that all the shares subscribed for were *bona fide* subscriptions, and that the like calls thereon had or would be paid; but he has since discovered that the deposits and calls on 605 shares only have been paid, and that no payments have been made on the 9,000 shares subscribed for by the defendants Gunston and others: that the plaintiff had requested the company, and the defendants, the directors, to compel payment of the said deposit and calls on the 9,000 shares, and also requested the representatives of A. Gordon to enforce the covenants entered into by the defendants in the parliamentary deed, which they refused to do: that the plaintiff at one time proposed to assign his shares to one A. Molony, but that the secretary of the company had refused to register the deed of transfer, on the ground that the calls had not been then paid; and that Molony had since, by deed, remised, released, and for ever quitted claim unto the plaintiff of all title and interest, in respect to the said shares.

The bill charged that the defendants, the directors, in order to give effect to the said fraud, and to indemnify themselves from the consequences thereof, intended to declare, or join in declaring, the 9,000 shares to be forfeited; and to justify such

a course, they pretend that they executed the parliamentary deed, as to the 9,000 shares, as a matter of form only, and intended to hold the same in trust for the company, as if the same had never been subscribed for, and that such trust was declared by the paper of the 4th of July 1837; but that the said defendants ought to be held responsible in respect of such subscriptions, as otherwise the same would be a fraud upon the House of Lords and upon the other subscribers and shareholders. The bill charged that the plaintiff had paid the call of 2*l.* per share to the bankers of the company, and no offer had been made to return it, yet the board of directors threatened to proceed to declare his shares forfeited; and it charged that the several members and subscribers, not parties thereto, except so far as the bill was filed on behalf thereof, are very numerous, being upwards of 100 in number, and many of them unknown to the plaintiff, and that it was impossible to make all the subscribers or members of the company, on whose behalf the bill was filed, parties thereto. The bill prayed, that it might be declared that the defendants, J. Guyon, W. Gunston, W. J. Richardson, H. Luard, J. H. Ritchie, J. Heygate, C. Duncan, S. S. Hall, and J. W. Hulme, were *bond fide*, or that in the circumstances aforesaid, they ought to be considered and treated as *bond fide* subscribers to the said undertaking, in respect of all the shares for which they respectively subscribed the parliamentary deed of the 16th of February 1837, and bound thereby; and that they respectively ought to perform and fulfil the covenants and agreements thereby respectively entered into by them; and that the said two memorandums or papers, dated respectively the 4th and 5th of July 1837, and all the acts, deeds, resolutions, and entries by which it had been attempted to give effect to the said memorandums or papers, or to the trusts thereby attempted to be created, might be declared to be illegal, fraudulent, and void; and that the before-mentioned entries, in respect of the said 9,000 shares, or any or either of them, and any (if any) transfers thereof, might be cancelled or expunged; and that the said shares might be retransferred into or entered in the names of the

said last-named defendants respectively, in the proportions in which such shares were respectively subscribed for by them in the said parliamentary deed, as of some date between the 24th and 31st days of May 1839; and that the said last-named defendants might be decreed to pay to the company the deposit of 1*l.* per share, and the amount of the said two calls of 5*l.* and 2*l.* per share, on their said 1,000 shares each, together with interest thereon, at 5*l.* per cent. per annum, on the amounts of such deposits and calls, from the times the same respectively ought to have been paid to the day of payment; and that the defendants, the Grand Collier Dock Company, and the directors thereof, might be decreed to treat the said 9,000 shares as *bond fide* belonging to and owned by the said other nine defendants, in the proportion of 1,000 shares each, according to their original subscription for the same, and might be decreed to enforce personally against the said last-mentioned defendants the payment of the said deposit and calls thereon, and also all future calls which might be thereafter made on the shares or proprietors of the company, on their said 9,000 shares; and that the company and the directors thereof might be restrained from making any other call upon the shares or proprietors of the company, until the said nine defendants should have paid the amounts of the deposits and calls already made on the said 9,000 shares; and that all necessary accounts might be taken, and all necessary directions be given, and declarations made for the purposes aforesaid; and that the covenants of the said parliamentary deed might, if necessary, be put in force against the said last-mentioned defendants, and that all necessary directions might be given for that purpose; and that the company and the directors thereof respectively, might, by decree, be perpetually, and in the meantime by order and injunction, restrained from declaring or from joining any person or persons in declaring the said 9,000 shares, or any of them, to be forfeited; and that all the defendants, except the company and the representatives of Gordon and J. Smith, might be decreed to indemnify and save harmless the company, and in particular the plaintiff and the other persons on

whose behalf the bill was filed, from all loss and damage arising from the said matters and transactions; and that the said nine defendants and Sir W. Heygate might be decreed to pay personally the costs of the suit; and also that the company and the directors thereof might, by decree, be perpetually, and be in the meantime by order and injunction, restrained from taking any steps to declare the forfeiture of plaintiff's said twenty shares, on the ground of the non-payment of either of the calls already made on the proprietors of the company, or on account of any other matter or thing already passed or happened.

J. Guyon, and the other of the first seven named defendants, the directors of the company, who had subscribed for the additional number of 1,000 shares each, demurred to the bill, for want of equity, and for defect of parties.

S. S. Hall, who had ceased to be a director, also demurred for like causes.

Mr. Jacob and Mr. Heathfield, for Guyon and the other directors.

Mr. Craig, for S. S. Hall.

Mr. Knight Bruce, Mr. Wakefield, and Mr. Lovat, for the bill.

The cases cited were—

Van Sandau v. Moore, 1 Russ. 458; s. c. 4 Law J. Rep. Chanc. 177.

Hichens v. Congreve, 4 Russ. 574; s. c. 6 Law J. Rep. Chanc. 167; s. c. cited 5 Law J. Rep. (N.S.) Chanc. 132; 1 Russ. & Myl. 150; 4 Sim. 420.

Bromley v. Smith, 1 Sim. 8; s. c. 5 Law J. Rep. Chanc. 53.

Attwood v. Small, 9 Law J. Rep. (N.S.) Chanc. 132.

Dec. 10.—The VICE CHANCELLOR.—Before I decide this case, I shall read carefully the act of parliament, as well as all the allegations in the bill; because it occurs to me, that the real object of the bill may be to give a sort of validity to that rule of the House of Lords, for the protection of the validity whereof, as I understand it at present, the act has made no provision. It seems to me, that it is contemplated by the framer of this bill, that whereas the

House of Lords requires, that before a bill shall be read in their Lordships' house a third time, it should appear that at least three-fourths of the number of shares were subscribed for, it would be a sort of fraud on that rule, if a subscription of three-fourths of the shares were made in such a manner as not permanently, and for all purposes whatsoever, to make those who had become subscribers of the three-fourths of the shares, holders of them, so that they could not get rid of them, but must, at all events, be liable to pay the amount of their subscriptions. It is a remarkable thing, that there should be such a rule in the House of Lords, and no such rule in the House of Commons; and possibly there may be no such rule in the lower house, because the members of that House consider, that the rule itself would be inoperative, unless clauses are introduced into the act to give it operation. It may be, that though their Lordships may think it right there should be such a rule in their House, the House of Commons may think it is not right there should be such a rule; and though that which is aimed at by their Lordships' rule, might be effectually accomplished by introducing clauses into the act of parliament, yet the act itself is passed without any such clauses: so that it appears the legislature collectively did not think it right there should be any clauses in the bill which should give such an effect to the rule of the House of Lords, as that which the framers of this bill had supposed that it ought to have; and it is with reference to that, I think, I ought closely to examine this act, and see how far that which has been done has been legally done; because, if it had been legally done within the terms of the act of parliament, though to a certain extent the object of the House of Lords has not been carried into effect, it only follows that that object has not been properly carried into effect because their Lordships have not so framed the bill as to produce the effect.

Dec. 21.—The VICE CHANCELLOR.—In this case there are two demurrers, one by Mr. Samuel Sanderson Hall, and the other by seven of those nine persons, with respect to whom a transaction is alleged to have taken place, that is termed fraudulent in

the bill, on account of their subscribing for 1,000 shares each, and of the manner in which those shares have been subsequently dealt with. The two cases of these persons differ in this respect,—that Mr. Hall has ceased to be a director, and therefore, as against him it does not appear that the same relief can be administered, as can be against the seven. But it appears to me, that as to the seven, in respect of their being directors, relief can certainly be administered; for instance, that relief which is asked, that they may be restrained from taking any further or other steps, to declare or procure the forfeiture of the plaintiff's twenty shares;—for that stands in this manner:—it appears that there was a deposit of 1*l.* paid, and a call was subsequently made by the directors for 5*l.* per share, and that was paid, and a call was made in October 1837, for another payment of 2*l.* per share; and it appears by a detailed statement which is given in the bill, that the 2*l.* per share was paid to the bankers of the company; and though it is true that under the act, in case a call upon a share had not been paid, the directors might proceed to declare it to be forfeited, yet I apprehend that in a case where, before any declaration of forfeiture, the whole amount of what was due in respect of a call had been paid, and, as this bill states it, no offer had been made to repay, this Court would not allow the directors to proceed to declare the share forfeited; because it is contrary to common equity, and the plainest sense and justice, that the parties should receive and keep in their possession the amount of a call, and after that proceed to declare the share to be forfeited for its non-payment; and, I think, if the case stood only upon that, that the demurrer of the seven persons must be overruled.

But, inasmuch as the case of Mr. Hall stands distinguished from the case of the other seven defendants, I have yet to consider with respect to him what will also apply to them—namely, the general equity of the case. Now, without using the term “fraudulent,” which is a term, I think, in fairness, hardly applicable to the transaction, the matter stands thus:—whether these nine gentlemen who became the subscribers for 1,000 shares each, signed the parliamentary deed or not,

is not very plain; but it is immaterial, because they are stated upon the bill to have been subscribers for the 1,000 shares each. I observe also, that there is a little difficulty, upon the face of this bill, in determining the fact, whether there were such memoranda as are mentioned of the 4th of July 1837, and the 5th of July 1837; but though it is merely stated in the first instance, that it is alleged there were such papers, which, of itself, is no allegation by the bill that there actually were any such; and though it is charged that the defendants represent there were such papers, and the contrary of those pretences are charged to be true; yet I observe, that the bill also states that these papers were fraudulent, and that they were made and entered into for a fraudulent purpose. Now, they could not have been fraudulent in fact, or have been made and entered into for any purpose, unless they were *simpliciter* made: they must have existed to have a quality or character; and then I observe moreover, that the prayer of the bill is express as to them, “that the two memorandums, dated respectively the 4th and 5th of July 1837, and all the acts, deeds,” and so on, “may be declared to be illegal,” which cannot be unless they exist. I take it then as a fact, which is represented upon this bill with sufficient plainness, that for the purpose of enabling the bill to pass through the House of Lords, the nine gentlemen did procure further subscriptions, to the amount of 9,530 shares, of which 9,530 shares each of the nine gentlemen took 1,000 shares. Whether they subscribed the parliamentary deed or not, is quite immaterial; they became the subscribers; and admitting that they did take the shares in trust for the company, what then? They were the holders of the shares, and if they were trustees for the company, they were still liable, by the very provisions of the act, to all those operations which were to be performed by virtue of the act, by those who held shares; and though they might have had, as any other trustees, to be reimbursed by their *cestuis que trust*, all expenses which they incurred in the execution of their trusteeship, they were, I apprehend, primarily liable. It is quite impossible to read this act of parliament without seeing that it was

the intention of the legislature that those who became shareholders should all of them pay rateably. Then, what was done? The parties do not seem to me exactly to have managed their case in the way which was necessary in order to relieve themselves from their liability. As I understand the bill, even to this day, there has been no transfer of the shares by these nine subscribers. The consequence of which is, that let them state what they please with respect to an acknowledgment of the trust, and with respect to an intention to exonerate them from any liability as trustees under the provisions of the act,—as I understand it, they were clearly liable, when calls were made by the directors upon other members who were shareholders, themselves to have calls made upon them; and it seems to me that this Court never would allow the directors of a company so to proceed, as partially to call upon some members who held shares to pay a deposit, and not to call upon others. And without in the least imputing fraud, and it appears to me no fraud was intended, and that the thing aimed at really was, or was intended, to be a benefit to all the other subscribers—namely, that all the subscribers might have the act of parliament which they wished for; the attainment of that object being sought for in this particular form of proceeding, by which the nine gentlemen became shareholders for 1,000 shares each—my opinion is, that in this respect there has been an error, which this Court will set right—namely, that when the directors thought proper to make a call as they did, they stopped short of that which was their duty; and that they ought to have gone on to direct the same sums to be paid by the several holders of these 9,000 shares, as were directed to be paid by the other members who are called the registered shareholders. It is plain to me, therefore, that whatever else may be done, and in whatever manner the thing may be done, this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon an equal footing, with respect to the liability to pay the calls.

My opinion, therefore, is, that upon the face of this bill, as it stands, there is a plain equity for the plaintiff to be relieved;

and in that respect, therefore, the demurrer must be overruled.

I think the bill could not have been constructed otherwise than as it is, on behalf of the plaintiff and all the other members, except the defendants; and it appears to me, the objection which has been made for want of parties is answered on the face of the bill; for the plaintiff alleges, that there are upwards of 100 persons; and according to the decisions which have been made on that point, that objection cannot be sustained; and, consequently, in both respects the demurrer must be overruled.

V.C. }
Nov. 20. } *In re CHRISTIE.*

Infant—Maintenance—Petition without Suit.

The Court will order an allowance to be paid for the maintenance of an infant, out of the income of his property, upon petition, without suit, notwithstanding the income is more than 300l. a year.

This was a petition for maintenance, out of an infant's personal estate, where there was no suit. The Master reported the income to be upwards of 1,500l. per annum, and approved of an allowance of 450l. a year, for maintenance of the infant.

Mr. Loftus Wigram, for the petition.

The VICE CHANCELLOR said, that the distinction which had been sometimes adverted to, as to the propriety of orders upon petition without suit, where the income was above, and where it was below 300l. a year, was without any foundation in principle; and he made the order according to the report.

M.R. }
Dec. 9, 22. } *HOLMES v. THE MAYOR, ETC.*
OF THE BOROUGH OF ARUN-
DEL AND ANOTHER.

Impertinence—Exceptions—Practice.

Where the Master reports part of an answer to be impertinent, and other part not

impertinent, and the plaintiff takes the usual proceedings to expunge the part found impertinent, he cannot afterwards, without the special leave of the Court, file exceptions to that part of the report which finds a portion of the answer not impertinent.

By an order made in this cause, dated the 28th of October 1840, on the application of the plaintiff, it was referred to the Master to see whether the defendants' answer was scandalous or impertinent. The Master, by his report, dated the 6th of November, found the answer in part impertinent, and in part not impertinent. The Master's report was filed on the 11th of November, by the plaintiff's solicitors. On the 16th of November, the plaintiff's solicitors took out a warrant to expunge the impertinent matter; and on the 17th of November, the defendants filed an exception to the Master's report; and by an order of the same date, the exception was set down for argument on the 18th of November. The warrant to expunge was returnable on the 19th of November, and the defendants' solicitors, at the return thereof, shewed for cause against expunging the impertinent matter, the order of the 17th of November. On the 25th of November, the plaintiff filed his exceptions to the Master's report; and by an order of the same date, it was ordered that the exceptions taken by the plaintiff to the report, should be set down to be argued, and that they should be advanced, and come on with the defendants' exception to be argued; and on the 27th of November, the plaintiff's solicitors received notice of the last-mentioned order. On the 5th of December, the defendants gave notice of motion to the plaintiff, that the Court would be moved on the 9th of December, that the exceptions filed by the plaintiff, might be taken off the file for irregularity, and that the order dated the 25th of November, might be discharged with costs. The point for the Court's consideration was, whether the plaintiff, under the circumstances stated, had not waived his right to except to the Master's report.

Mr. Pemberton and *Mr. Rogers*, in support of the notice of motion, contended, that the general rule was not doubted, viz. that a party having adopted a record, could

not raise an objection to it; that the plaintiff having, in the case before the Court, acted under the order obtained by himself voluntarily, he could not afterwards both approve and disapprove thereof—*Beavan v. Waterhouse* (1).

Mr. Wray, contra, contended, that there was nothing inconsistent in the plaintiff taking out a warrant to expunge the impertinent matter found by the Master, and then excepting as to scandal—*Norway v. Rowe* (2), and that the rule must be the same as to impertinence.

December 9.—His Lordship, after referring to the case of *Evans v. Owen* (3), observed, that he thought there ought, in a case like the one before him, to have been a special application made to the Court by the plaintiff; but that he would look into the cases on the subject, before he decided the point.

December 22.—The MASTER OF THE ROLLS.—It is clear the defendants were at liberty to file their exception; but I think the plaintiff, having taken out and served the warrant to expunge, was not entitled to set down his exceptions to the Master's report, without the leave of the Court being first obtained for that purpose. The proceedings taken by the plaintiff are not consistent. It is very likely that the plaintiff, when he took out the warrant to expunge, did not think the defendants would except to the Master's report; and under the circumstances, it is possible, if application had been made to the Court, it would have given the plaintiff liberty to except to the Master's report, notwithstanding his having taken out the warrant to expunge. The cases of *Evans v. Owen* and *Norway v. Rowe* are not applicable to the case before me, where the party has admitted the report previously to his taking exceptions thereto. The plaintiff's exceptions must be taken off the file.

(1) 2 Beav. 58; s. c. 8 Law J. Rep. (N.S.) Chanc. 370.

(2) 1 Mer. 135.

(3) 2 Myl. & K. 382; s. c. 5 Law J. Rep. (N.S.) Chanc. 74.

V.C.
 Aug. 2, 1839. }
 L.C. EASUM v. APPLE-
 Nov. 22 & 23, 1839. } FORD.
 Nov. 3, 1840. }

Will—Power of Appointment—Construction.

*A testator directed the trustees of his will to invest 3,000*l.*, upon trust for his daughter, M. A. E. for life, and after her death, upon such trusts as she should appoint by will; and he gave a share of his residuary estate to M. A. E. absolutely. M. A. E., by her will, after reciting that the trustees had purchased stock indiscriminately with the 3,000*l.*, and also with the share of residue to which she was entitled absolutely, directed the whole of the stock to be transferred to two trustees, upon trust, to pay 2,700*l.*, part thereof, to her mother, and other part to another legatee, and to stand possessed of the residue of the trust funds after satisfying the legacies, upon trust for the benefit of other parties. The mother of M. A. E. died in her lifetime:—Held, that the will of M. A. E. did not operate as an appointment of the 2,700*l.**

Matthew Easum, by his will, dated the 18th of January 1816, directed the trustees of his will to invest 3,000*l.* upon certain trusts, for the benefit of his daughter, Mary Ann Easum, for her life, and after her decease for her children; and in default of children, the testator directed that the said sum of 3,000*l.* should be and remain upon such trusts and for such purposes as Mary Ann Easum should by will appoint; and in default of any such direction or appointment, the said sum of 3,000*l.* was to "be and remain, (or in case any such direction or appointment should be made, then such parts of and interest in the said sum of 3,000*l.* as either should not be well and effectually comprised therein, or should be comprised therein, but whereof the trusts and estates to be thereby limited should either never take effect or should determine, should be and remain)" upon the same trusts as were declared by the will respecting the residue of the testator's estate. The residue was bequeathed in equal shares to all his children, except one,

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who should be living at his death. The testator died in February 1816.

Mary Ann Easum made her will, dated the 12th of August 1835, which, after fully reciting the bequest of 3,000*l.*, was as follows:—"And whereas the said trustees, after the decease of my late father, laid out and invested not only the said sum of 3,000*l.*, and the surplus of the dividends which accrued from time to time during my minority, but also my share of the said testator's residuary estate, to which I was absolutely entitled under his said will, on attaining my age of twenty-one years, indiscriminately in the purchase of various sums of stock in the public funds, so that it is now difficult to ascertain how much of such stock was purchased with the said sum of 3,000*l.*, and the surplus dividends thereon, and how much with my said share of the said residuary estate, and the surplus dividends thereon; but the stocks or funds which have arisen from both the said sources, and which are now standing in the names of my trustees, in the bank books, consist of the sum of 6,700*l.* or thereabouts, in the 3*l.* per cent. consolidated annuities; and whereas I attained my age of twenty-one years several years ago, and thereby became entitled, and am now desirous, to exercise the power of appointment given or reserved to me by the said will of my said late father"—the testatrix, then, in pursuance of the said power and authority, and of all other powers and authorities enabling her in that behalf, did by her will direct and appoint, that the said sum of 3,000*l.*, and all other monies, stocks, or funds over which she had any power of appointment given to her by the said will, should go and be transferred by the trustees or trustee, in whose names or name the same might happen to stand at her decease, unto two other trustees, upon trust that they should thereout assign and transfer 2,700*l.* 3*l.* per cent. consolidated annuities, or so much of any other stocks or funds constituting any part of the said trust funds as should be equal in value thereto at the day of her decease, unto the testatrix's mother Ann Easum, for her absolute use and benefit; and also a sum of 250*l.* to Sarah Williams, for her absolute use; and should stand possessed of the residue of

M

the said stocks or funds and securities as aforesaid, constituting the remainder of the said trust funds, upon the trusts thereafter declared concerning her (the testatrix's) residuary estate and effects; and as to all the residue of her stock in the public funds, and all her monies, securities for money, and all the residue of her estate and effects whatsoever and wheresoever not thereinbefore bequeathed and disposed of, and whether in possession or reversion, remainder or expectancy, under the will of her said late father, or her late grandfather, or otherwise howsoever, she gave and bequeathed the same unto the said two trustees, upon trust to get in, receive, and convert into money, all such parts of her residuary estate and effects as should not consist of money or stock, and invest the same as therein directed, and stand possessed of all such stocks, funds, and securities, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock thereinbefore directed to be paid or transferred thereout, unto her said mother and the said Sarah Williams, upon trust, (except as to a sum of 1,000*l.*,) for the benefit of the first-named defendant, Joseph Appleford, and his children. And the testatrix declared, that none of the legacies or sums of stock thereinbefore given should be considered as a specific legacy.

Ann Easum, the mother of the testatrix, died on the 6th day of January 1839, and on the 30th of the same month the testatrix died without issue.

The bill was filed by the trustees of the will of Matthew Easum, against the residuary legatees, both of Matthew Easum and Mary Ann Easum, and prayed the direction of the Court as to the 2,700*l.*, which had been bequeathed by Mary Ann Easum to her mother.

It was contended by the residuary legatees under Matthew Easum's will, that as the trusts of the will of Mary Ann Easum, as to the 2,700*l.* had not taken effect, that fund was within the residuary clause of Matthew Easum's will, and that the appointment of the residue of Mary Ann Easum's estate only comprised what remained after taking away the sums previously given, and did not include any lapsed legacy.

On the other hand, it was insisted, that by the direction in Mary Ann Easum's will, that the whole fund should be transferred by the trustees of her father's will into the names of her own trustees, she manifested a clear intention to dispose of the whole fund over which she had a power of appointment; and that the ordinary rule, that lapsed legacies fell into the residue for the benefit of the residuary legatees, applied to the present case.

The next-of-kin of Mary Ann Easum contended, that the direction to transfer the fund to her own trustees, excluded the claim of the residuary legatees of Matthew Easum to any part of the fund, but that the lapsed legacy of 2,700*l.* was not included in her residuary bequest, and, therefore, belonged to her next-of-kin.

The VICE CHANCELLOR was of opinion, that the will of Mary Ann Easum did not operate as an appointment of the 2,700*l.*

The residuary legatees of Mary Ann Easum appealed from this decision.

Mr. Wigram and *Mr. Sheffield* appeared in support of the appeal; and—

Mr. Jacob, *Mr. Stuart*, and *Mr. Craig*, *Mr. G. Richards*, and *Mr. Coleridge*, *Mr. Piggott* and *Mr. T. Parker*, for different defendants.

The following cases were cited:—

Falkner v. Butler, Amb. 514.

Oke v. Heath, 1 Ves. sen. 135.

Leake v. Robinson, 2 Mer. 393.

Malcolm v. Taylor, 2 Russ. & Myl. 416.

2 *Sugden on Powers*, 17, 29.

2 *Chance on Powers*, ch. 14. sec. 2.

Nov. 3. — The LORD CHANCELLOR.—The Vice Chancellor's decree declares the sum of 2,700*l.* 3*l.* per cents. not appointed under the will of Mary Ann Easum, and that the same constituted part of the residue of Matthew Easum's estate. This the appellants contest, and they insist that the sum of 2,700*l.* was well appointed.—[His Lordship stated the two wills.]—The mother died before the testatrix, M. A. Easum, and the bequest of the 2,700*l.* thereby failed; and the question is, whether that sum went as part of the residuary estate of the testatrix, or was unappointed.

The appellants relied on the residuary gift as carrying the lapsed legacy; and the rule is, that a residuary gift will generally carry a lapsed legacy. In *Oke v. Heath*, the facts are such as prevent it from being an authority in the present case. In *Falkner v. Butler*, the donee of the power bequeathed money for the benefit of persons who were not objects of the power: neither does the principle on which *Malcolm v. Taylor* was decided affect this case. The cases of lapsed appointments are inapplicable.

The proposition, that the donee of the power has made the funds in question part of her estate, is quite untenable; for she clearly distinguishes between her own property and that which was not her own. —[His Lordship read the recital in *M. A. Easum's will*.]—The funds had been, in this case, united by the trustees in one investment. Suppose, for instance, the whole fund belonging to a testator had been 900*l.*; and he had given 800*l.* to one person, 300*l.* to another person, and the residue to a third person:—there can be no question that the gift of the residue would not carry the first 300*l.* If so, where is the difference between such a case and the present one? There is here no residuary gift applicable to this fund.

The general rule, that a residuary clause passes a lapsed legacy, arises from the circumstance, that the residuary clause is deemed and understood to comprise every thing not before given and bequeathed by the will. The Court gives effect to the general intention of the testator; but where the general presumption in favour of a residuary legatee is negatived, the rule does not apply. In the case of a gift to tenants in common, if one dies, the survivor does not take the whole—*Cambridge v. Rous* (1), and *The Attorney General v. Johnstone* (2). The residuary legatee, in order to take the whole, must be a general legatee: for if the testator confines the residue to what may remain after certain deductions, the residuary legatee becomes a specific legatee.

Appeal dismissed.

- (1) 8 Ves. 25.
(2) Ambl. 580.

L.C. }
Dec. 18. } LOWE v. PENNINGTON.

Will—Power—Appointment.

*A, having a power of appointment, by will, of a sum of 4,000*l.*, bequeathed several pecuniary legacies, which greatly exceeded the amount of her estate, exclusive of the 4,000*l.*, and then bequeathed to L. all other her personal estate, and over which she had any disposing power. The will did not contain any reference to the 4,000*l.*, or to any power of appointment:—Held, that the power was well executed by the residuary bequest; and that L. was entitled to the whole sum of 4,000*l.*, to the exclusion of the legatees.*

A testator, after directing the surplus of his personal estate to be invested, and bequeathing several legacies, continued as follows:—"I do hereby declare it to be my will, that notwithstanding anything contained to the contrary, it shall be lawful for my wife by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil thereto, to give or dispose of, to such person or persons, and in such parts, shares and proportions as she shall think proper, and to be payable and paid within twelve calendar months next after her decease, out of the said surplus of my personal estate, so directed to be placed at interest on real or government security as aforesaid, any sum not exceeding 4,000*l.*; and my said trustees, or the survivor, &c. shall pay accordingly the money which she shall so dispose of: but if my wife shall omit so to dispose of the said sum of 4,000*l.* or any part thereof, then and in such case, and as to so much of the said 4,000*l.* as she shall omit so to dispose of, the power hereby given respecting the same shall be considered as void."

The testator died in 1825, and his wife made her will, dated the 21st of June 1834, in which she did not make any reference to her husband's will, or to any specific power of appointment. She thereby gave several legacies, amounting to the sum of 3,500*l.*, and then bequeathed the residue of her estate in the following terms:—"I give, devise, and bequeath all my

household furniture, plate, linen, china, books, and all and singular other my personal estate and effects whatsoever and wheresoever, *and over which I have any disposing power*, and all my real estate, to my said niece, Mary Ann Lowe, (the plaintiff,) her heirs, executors, administrators, and assigns absolutely, as and for a present vested interest, for her sole, separate, and independent use."

The testatrix died in 1836. The property which belonged to her, independently of the 4,000*l.*, over which she had a power of appointment by virtue of her husband's will, did not, either at the time of her death or at the making of her will, exceed 750*l.* or thereabouts.

The bill was filed against the executors and residuary legatees of the original testator, and the executor and legatees of the testatrix; and prayed a declaration, that the testatrix had executed the power of appointment in favour of the plaintiff alone; and that the 4,000*l.* and interest might be paid over to her.

Mr. G. Richards and *Mr. Wright*, for the plaintiff, insisted, that under the bequest of all personal estate *over which the testatrix had any disposing power*, the 4,000*l.* would pass to the plaintiff.

It was contended, on the other hand, on behalf of the legatees named in the testatrix's will, that as she never had any estate out of which the legacies could be paid, except this sum of 4,000*l.*, she clearly intended that they should be paid out of that fund.

Mr. Wigram, *Mr. Spence*, *Mr. Chandless*, *Mr. Younge*, *Mr. S. Sharpe*, and *Mr. H. Clarke*, appeared for different defendants.

The following cases were cited:—

Bailey v. Lloyd, 5 Russ. 330; s. c. 7 Law J. Rep. Chanc. 98.

Lowe v. Hackward, 18 Ves. 168, and 1 Sugden on Powers, 392.

Trollope v. Linton, 1 Sim. & Stu. 477; 2 Law J. Rep. Chanc. 3.

Adams v. Austen, 3 Russ. 461.

Walker v. Mackie, 4 Russ. 76.

The LORD CHANCELLOR held, that the power of appointment given by the testator to his wife over the 4,000*l.* was well

executed by her will; and that the plaintiff was entitled to that sum: the costs of the testator's executors and of the plaintiff, to be paid out of the fund. No other costs to be allowed.

L.C.
Jan. 23, 24; } BRENT v. BRENT.
Nov. 12.

Agreement—Cancelling Family Arrangement—Fraud.

*The owner of some leasehold tenements, being persuaded by a conveyancer that other parties were entitled to part of the estate, entered into an agreement by which the estate was to be sold, and all these parties were to share in the purchase-money, and 40*l.* was to be paid to the conveyancer. The Court being of opinion that the agreement had been obtained by fraud, misrepresentation, and pressure, ordered it to be delivered up to be cancelled, with costs as against the conveyancer.*

The bill stated that by an indenture of settlement of the 21st of October 1771, certain pieces of land and tenements held for the then residue of a term of 2,000 years, and belonging to Nicholas Brent, were assigned to a trustee, in contemplation of the marriage of Nicholas Brent, a nephew of the first-named Nicholas Brent, upon certain trusts for the benefit of Nicholas Brent, the nephew, during his life, and, after his decease, for the benefit of the issue of the intended marriage, and in default of such issue, in trust for the right heirs of the settlor, during all the residue of the term.

Nicholas Brent, the settlor, made a codicil to his will, dated the 17th of July 1780, by which, after referring to the settlement, and stating that there was no issue of the marriage of his nephew Nicholas, and that there was no probability of any issue, he bequeathed these premises to two trustees, for the residue of the term of 2,000 years, in trust for his nephew, Thomas Brent, for life, and, after his decease, upon trust for his first and other sons successively in tail male; and, for default of such issue, upon certain trusts for the benefit of his nephew, William Brent, and his issue; with the ultimate

limitation to the use of the right heirs of the testator for the residue of the term.

Nicholas Brent, the testator, died in 1782, and Nicholas Brent, the nephew, died in 1787, without issue. Thomas Brent entered into possession of all the premises comprised in the settlement, and remained in possession of them till his death, in 1809. The plaintiff was the eldest son of Thomas Brent, and thus became absolutely entitled to the premises, and remained in possession of them till 1830, when he entered into a contract to sell them.

Thomas Brent, the father of the plaintiff, died without leaving any provision for his widow and family; and the plaintiff had allowed his mother, Hannah Brent, a sum of 40*l.* for several years till 1823, when he discontinued this allowance, and afterwards supplied her with different things and with small sums of money, till September 1829, when Hugh Snell, a conveyancer, one of the defendants, acting on behalf of Hannah Brent, caused a distress to be put upon the said premises for a sum of 220*l.*, for certain arrears which he alleged to be due to Hannah Brent, in respect of an annuity payable to her of 40*l.* per annum. The plaintiff, being alarmed at this proceeding and at the threats of Snell to sell his stock, &c., signed an agreement, dated the 1st of September 1829, which was prepared by Snell, by which the plaintiff agreed to pay the sum of 220*l.* and the costs of the distress. Hugh Snell afterwards represented to the plaintiff that, under the limitations in the codicil, Hannah Brent, and Mary Brent, and R. P. Haddy, as the heirs at law, or the representatives of the heirs at law, of Nicholas Brent, the settlor, had a claim to part of this property; and Hugh Snell prepared an agreement, dated the 7th of September 1829, between the plaintiff of the one part, and Hannah Brent, Mary Brent, and R. P. Haddy of the other part, by which it was recited that Hannah Brent, Mary Brent, and R. P. Haddy claimed an interest in the said premises, and were about to commence proceedings for the recovery thereof, and, in order to prevent the expense and uncertainty of litigation, the said Thomas Brent, Hannah Brent, Mary Brent, and R. P. Haddy had

agreed that the premises (except a part therein mentioned) should be sold; and out of the proceeds 40*l.* was to be paid to Hugh Snell, for his costs and expenses prior to the date of the agreement, and such further costs as might be incurred by him as the legal adviser of Hannah Brent, Mary Brent, and R. P. Haddy, and by Mr. W. H., the legal adviser of the plaintiff, in and about the sale. One-third of the proceeds was to be given to Hannah Brent, and 150*l.* paid to each of the said Mary Brent and R. P. Haddy; and the residue of the purchase-money was to be paid to the plaintiff; and the parties agreed to execute conveyances to carry this agreement into effect.

The bill alleged that this agreement was procured by fraud and imposition practised upon the plaintiff by Hugh Snell; and that Snell had entered into an arrangement with the other parties that he should receive one moiety of any sum which they might recover by his means from the plaintiff.

Hannah Brent had filed a bill to have this agreement enforced, which was dismissed. The defendants were Hannah Brent, Mary Brent, R. P. Haddy, and Hugh Snell. The bill prayed that the defendants might be decreed to deliver up the agreement of the 7th of September, 1829, to be cancelled.

It was stated in the answer of the defendant Snell, that several accounts were produced to him by John Brent, another son of Hannah Brent, by which it appeared that a sum of 40*l.* per annum had been regularly allowed in account between Hannah Brent and the plaintiff from 1809 till 1823; and that when the distress was levied, the plaintiff did not dispute his mother's right to distrain, but insisted the distress was for a greater sum than was due to her; and he denied that any agreement had been entered into, by which he was to receive any part of the money which might be recovered from the plaintiff.

Mr. Wigram and *Mr. Koe*, for the plaintiff, contended that this was not an amicable settlement of family disputes, which the Court would endeavour to sustain; but was an agreement obtained by misrepresentation, and pressure, and fraud; and

that the Court would therefore relieve the plaintiff against it—

Naylor v. Winch, 1 Sim. & Stu. 555 ;
s. c. 2 Law J. Rep. Chanc. 132.

Lansdown v. Lansdown, Mos. 364.

Bingham v. Bingham, 1 Ves. sen. 126.

Stockley v. Stockley, 1 Ves. & B. 23.

Dashwood v. Peyton, 18 Ves. 46.

Mr. Girdlestone and Mr. Teed, Mr. Bacon and Mr. Speed, for different defendants, contended, that, although Hannah Brent, and other members of her family, might be wrong in imagining they had any claim upon this property, still the agreement was entered into by the plaintiff for the purpose of avoiding litigation and trouble, and the Court often supported such agreements between members of a family.

Stephens v. Lord Bateman, 1 Bro. C.C. 22.

Roche v. O'Brien, 1 B. & Beat. 330.

Leonard v. Leonard, 2 B. & Beat. 179.

Stapilton v. Stapilton, 1 Atk. 2.

Cann v. Cann, 1 P. Wms. 727.

Pullen v. Ready, 2 Atk. 587.

Mr. Wigram replied.

Nov. 12.—The LORD CHANCELLOR (after stating the facts of the case).—In May 1834, Hannah Brent filed her bill for a specific performance; and the present bill was filed to compel a delivery up of the agreement to be cancelled. There is no trace of any right in Hannah Brent or the other persons making any claim. The undisputed owner gave up one-third to one party, and 300*l.* to two others, and 40*l.* to another, without receiving any consideration whatsoever for the same. The plaintiff alleges his ignorance, and that his agent, Snell, acted without his authority. It is necessary that the evidence should be very minutely examined. Did then Mr. Snell act fairly, or was he guilty of fraud? [His Lordship referred to the evidence respecting Snell.] Snell dealt with the plaintiff on behalf of Hannah Brent, and set up a claim in her behalf, which was unfounded. As a contract, it is impossible to support the agreement. Snell knew Hannah Brent had no title. The object of the parties was not to compromise doubtful rights, but to buy up the rights of others. The

observations of Sir J. Leach, in *Naylor v. Winch* and *Harvey v. Cooke* (1), explain how the Court regards such transactions. As against Hannah Brent the case is one of threats and intimidation. As against Mary Brent and Haddy, the case is different, there being against them less of violence and threats. They were not parties to the agreement to be set aside, and they state that but for Snell they should not have set up any claims. Under such circumstances, the plaintiff is not entitled to costs, as against them; on the contrary, they would have been entitled to their costs if they had not made such claims by their answer. As it is, they must pay their own costs. But the plaintiff is entitled to a decree for the delivery up of the agreement to be cancelled, with costs, against Snell, who claims a sum of 40*l.* against the plaintiff, to which he can shew no possible right.

M.R. }
Nov. 5, 6; } *In re SHARP'S PATENT.*
Dec. 22. }

Patent—Amendment of Specification—
Jurisdiction—Statute 5 & 6 Will. 4. c. 83.

The Master of the Rolls has jurisdiction to order a clerical error in the specification of a patent to be amended; but has not jurisdiction on the petition of a party who claims adversely to the patentee, to order part of a specification or memorandum to be struck out, which the patentee is desirous to sustain.

On the 8th of October 1836, J. Sharp obtained a patent for an invention of "certain machinery for converting ropes into tow, for certain improvements in certain machinery for preparing hemp or flax for spinning, part of which improvements were also applicable to the preparing of cotton wool and silk for spinning." The specification of the invention was enrolled on the 8th of April 1837.

On the 31st of May 1838, the petitioner, Joshua Wordsworth, obtained a patent for an invention of "improvements in machinery for heckling and dressing flax, hemp, and other fibrous materials." The

(1) 4 Russ. 34; s. c. 6 Law J. Rep. Chanc. 84.

specification of this invention was enrolled on the 30th of November 1838. In the month of September 1838, after the date of Mr. Wordsworth's patent, and before the specification of his invention was enrolled, Mr. Sharp obtained, from the Solicitor General, an order or certificate, directed to the clerk of the patents, whereby it was certified that the Solicitor General gave leave to Mr. Sharp to file a certain memorandum of alteration of the enrolled specification, pursuant to the statute of 6 Will. 4. c. 83. When Mr. Wordsworth enrolled his specification, he had not been informed of the memorandum of alteration filed by Mr. Sharp; and he now presented a petition to the Master of the Rolls, in which he alleged, that the machinery described in Mr. Sharp's memorandum of alteration constituted a new machinery; and he claimed the exclusive right granted by Mr. Sharp's patent, insisting that it was in substance the same machinery invented by the petitioner and described in the specification. The petitioner complained of this proceeding, as injurious to him, and prayed, by his petition, that such portion of the memorandum of the alterations of Mr. Sharp's specification as were in the petition particularly set forth, and were, in substance, descriptive of the same machinery as was invented by the petitioner, as thereinbefore mentioned, might be expunged from the memorandum of alteration and the rolls of the court.

Mr. Pemberton and *Mr. James Russell* appeared in support of the petition, and contended, that the specification and the memorandum were records of the court, and that the Master of the Rolls had jurisdiction to have those records amended; which jurisdiction was not ousted by the jurisdiction given to the Privy Council, by the 2nd section of 5 & 6 Will. 4. c. 83; that the assistance asked by the petition was, in substance, an amendment of the record; and that the petitioner had such an interest in the invention, that he was entitled to the assistance of the Court.

Mr. M. D. Hill and *Mr. Bacon*, contra, insisted, that the specification and the memorandum were not records of the court; and that the petitioner's remedy, if he had sustained any injury, was by *scire facias*; and that the Master of the

Rolls had not any jurisdiction to make the alteration which was asked for.

The following cases were cited—

In re Redmund, 5 Russ. 44.

Perry v. Skinner, 2 Mee. & Wels. 471;

s. c. 6 Law J. Rep. (N.S.) Exch. 124.

The Attorney General v. Aspinall, 2

Myl. & Cr. 613; s. c. 7 Law J. Rep.

(N.S.) Chanc. 51.

The Attorney General v. the Corporation of Norwich, 2 Myl. & Cr. 430.

Dec. 22.—The MASTER OF THE ROLLS (after stating the facts of the case).—The question now is, whether, supposing the facts to be as alleged, I have authority to do what is asked by this petition, and I am very clearly of opinion that I have not.

Patents for inventions are granted for the purpose of each invention being enrolled in a limited time; and memorandums of alterations are allowed for the purpose only of correcting a certain description of errors; and I am of opinion, I have no authority to make any alteration in the enrolment of the patent, or of the specification. The party enrolling his specification does it at his own peril; and if in his specification he expresses something by which his patent is rendered invalid, he must submit to all the ill consequences of that; and those who have a right to take advantage of it must do so in a legal course. They cannot require the Master of the Rolls to alter that which the patentee has claimed by the specification, or which the patentee has disclaimed by his specification; and compel the party to say something which he never intended to say. There were very good reasons for relieving patentees from the risk and liability to which they were subject in the specification; and the 6 Will. 4. authorized the disclaimer to be enrolled, with the leave of the Attorney or Solicitor General; and enacted, that when that was so done, the same should be deemed and taken as part of such letters patent or specification in all courts whatever, from the time of filing the memorandum of alteration. The memorandum of alteration now being part of the specification, I conceive it ought to be dealt with as such, and not otherwise. If it was alleged in

the memorandum of alteration, that the specification contained verbal or clerical errors, by means of which something might be enrolled contrary to the true intention of the party, and if sufficient evidence were given of the fact, I should think myself bound to correct the error, and make the enrolment accord with the specification at the time of the enrolment. But it never has been supposed that the Master of the Rolls has been permitted to alter the enrolment. A party may have claimed too much, and thereby may have made his patent good for nothing; or may have omitted to claim something he was entitled to; but on such grounds the keeper of the records could not interfere on his behalf; and, I apprehend, no attempt has ever been made to induce the keeper of the records to expunge, on his authority, some claim, which the patentee desired to sustain, and was willing to defend in due course of law. The keeper of the records has no authority to decide whether there is any extension, nor has he any means of investigating the truth and justice of the case. It is no part of his duty, when he receives the enrolment into his custody, to consider whether the Attorney General or the Solicitor General has properly or improperly given leave to the party to file the memorandum, nor can he afterwards determine such question.

I delayed my decision in order that I might give time to inquire what has been done in the enrolment office, and what has been done in the court: and from the information I have received, it would seem that it has always been usual to amend clerical errors, when clerical errors have been made in grants of the Crown, and so on. They have been done by the Master of the Rolls, sometimes under the authority of a warrant from the Crown, sometimes by the consent of the Attorney General, sometimes by a reference to the Master of the Rolls by the Lord Chancellor; and there is an instance of the enrolment being amended by the order of the Lord Chancellor, pursuant to an order of the Crown. The errors have been corrected by the Privy Seal, or in the original grant. At an early period, the enrolment was amended at the request of the grantor, who acknowledged it, but I have not been

supplied with any case where the amendment has been made of the patent, but only of this kind; in a case before Lord Gifford the word "wire" had been written instead of the word "fire." In the case of *Redmund*, which is reported, the enrolment was amended in respect of numbers and figures by Sir John Leach. It was amended in respect of two errors, the word "which" being written instead of the word "wheel;" and the word "increase" having been written instead of the word "inverse." I have had cases before me of the same kind; and in every case which has occurred, it has been intended to do no more than to amend mere slips or clerical errors made by the parties or their agents, who have by mere inadvertence or by mistake made an enrolment which did not purport to be the true statement of that which the parties intended at the time they made the enrolment. Not only have the errors been altered; but in order to enable the parties to dispute it, it has been ordered, that the order should be indorsed on the enrolment. It does not seem that the keeper of the records, or the Master of the Rolls, has ever done more; and being of opinion that I have no jurisdiction to make any such order as is asked by this petition, I must dismiss the petition with costs.

M.R. }
Dec. 22. } WEST V. SMITH.

Order on Petition—Practice.

This was a motion to discharge an order made on a petition entitled in a cause which did not exist. And it was objected, that the order made, could only be discharged on petition, but—

The MASTER OF THE ROLLS, after referring to the case of *In re Dovenby Hospital* (1), and stating that the title prefixed to the order shewed a false suggestion, granted the motion.

Mr. Pemberton, in support of the motion.

Mr. Tennant, contra.

(1) 1 Myl. & Cr. 279; s. c. 5 Law J. Rep. (N.S.) Chanc. 212.

V.C. }
 Nov. 6. } BEEVOR v. PARTRIDGE.

Legacy—Unappropriated Monies out of Income given for Maintenance.

Gift of a fund to trustees upon trust to pay, apply, and dispose of the interest, dividends, and produce thereof, for the maintenance, support, and benefit of the testator's son R., and his daughters L. and M, and the survivors and survivor of them, in such shares and proportions, and in such manner, as his said trustees should think most proper; the trustees applied part of the income only in support of the children, who all died intestate:—Held, that the unapplied portion of the income, which accumulated during the lives of the three children, and of the survivors, belonged to the representative of the survivor of the three children, and not to the residuary legatees of the testator.

R. Partridge bequeathed the residue of certain funds to trustees, upon trust to pay, apply, and dispose of the interest, dividends, and produce thereof for the maintenance, support, and benefit of his son Robert, and his daughters Lydia and Mary, and the survivors and survivor of them, in such shares and proportions, and in such manner, as his said trustees, or the survivors or survivor of them, should think most proper and advisable; and he empowered his trustees to apply the principal of such trust monies for the use and benefit of his said children, and their issue, as the trustees should think proper; and in case his son and daughters should all depart this life, without having any child or children, he bequeathed the said trust monies over to other persons. The testator died in 1802. The testator's three children were during the whole of their lives of unsound minds: Mary died in 1831, Lydia in 1836, and Robert in 1839. The trustees applied so much of the dividends as they thought necessary for the maintenance of the three children, during their lives; and at the death of Robert, the survivor, there remained in the hands of the trustees the sum of 23,000*l.*, in respect of the accumulation of the interest of the trust monies, during the lives of the three children, over and above what had been applied for their maintenance. This sum

was claimed by one of the defendants as the representative of Robert, the survivor of the three children; and it was also claimed by others of the defendants, as having fallen into the residuary personal estate of the testator on the children's death without issue. The bill was filed by the trustees, against the different claimants, for the declaration of the Court on the question of their rights.

Mr. Wigram, Mr. Girdlestone, and Mr. Teed, for the residuary legatees, relied upon—

M'Donald v. Bryce, 2 Keen, 276, 517;
 s. c. 7 Law J. Rep. (N.S.) Chanc. 173, 217.

Mr. K. Bruce, Mr. Jacob, Mr. Sharpe, Mr. Metcalfe, and Mr. Phillips, for the other parties, cited—

Harding v. Glyn, 1 Atk. 469.

Brown v. Higgs, 8 Ves. 570.

Barber v. Barber, 3 Myl. & Cr. 688;
 s. c. 7 Law J. Rep. (N.S.) Chanc. 70;
 8 *ibid.* 36.

Webb v. Kelly, 9 Sim. 469.

THE VICE CHANCELLOR.—The meaning of the words used by the testator, seems to me sufficiently plain. In the first place, the gift is to the trustees, upon trust "to pay, apply, and dispose of all the rest and residue of the interest, dividends, and produce of the said trust money, for the maintenance, support, and benefit of his son Robert, and his daughters Lydia and Mary, and the survivors and survivor of them." These words create an express trust to apply the dividends for the benefit of the three children. The testator then goes on to direct the mode of application, which is to be, "in such manner as the trustees and executors, or the survivors or survivor of them, his executors or administrators, shall think most proper and advisable." These words clearly give the trustees a discretionary power only as to the distribution of the income of the fund amongst the children. I asked in the course of the argument, what could have been done in case the trustees had refused to make any directions as to the application of the interest of the fund; and the answer was, that the Court would have interposed and administered it: but how could that be,

unless there had been previously a gift of the income to the children? I think there is, by this will, a gift of the dividends of the fund to the three children, with a power in the trustees to modify the gift, as to the manner of its distribution; and that, whether this power was exercised or not by the trustees, the gift remained. The declaration must therefore be, that the surplus dividends accumulated during the life of the three children, and of the survivors, belonged to Robert, as the survivor of the three.

M.R. } THE ATTORNEY GENERAL v.
Nov. 25. } CHAPMAN.

Information—Executor—Admission of Assets.

A testator directed his executors to purchase sufficient stock in the 3l. per cent. consols, to produce 20l. per annum, which he directed to be annually divided among the poor of a parish. He then devised his real estates in that parish to A and B, whom he also appointed executors. A died a few years after the testator. The annual sum of 20l. was paid in the manner directed by the will, out of the rents of the real estates, by B during his life, and after his death by his devisees, on the supposition that it was a charge on the real estates. These payments were continued for about twenty-five years, when the devisees refused to continue the payment, and the executor of B then paid the 20l. per annum for seven years, when he declined to continue to pay it. He had not received sufficient assets of B to purchase the requisite amount of stock. An information having been filed to compel the executor of B to purchase the requisite amount of stock, it was held, that he must be considered as having admitted assets of B, and he was decreed to purchase the stock, and make good the arrears of the annuity.

George Perkins, by his will, dated the 6th of December 1799, directed his executors to purchase out of his personal estate so much in the 3l. per cent. consolidated Bank annuities, as would produce a yearly sum of 20l., and to stand possessed thereof, upon trust, to pay the dividends to the vicar and churchwardens for the

time being of the parish of Barrow-upon-Soar, to be distributed by them on the 21st of December yearly, amongst the necessitous poor of that parish. And the testator declared, that the sum necessary to make such purchase should be the first charge on his personal estate, and should be paid before his debts and other legacies, which he thereby charged upon his real estates, in the event of his personal estate being insufficient to satisfy them after such investment as aforesaid had been made. And he devised his real estate (charged as aforesaid), and also his personal estate, to William Chapman and Daniel Chapman, to be divided between them; and he appointed them executors of his will.

The testator died shortly afterwards; and William Chapman died in 1804, leaving his co-executor, Daniel Chapman, surviving. It was supposed that the requisite sum of stock had been purchased, and afterwards sold out: but Daniel Chapman regularly paid the 20l. per annum up to December 1820, when he died, having appointed his son Joseph Chapman, the first-named defendant, his executor; and having also devised his real estates at Barrow to his other sons, the brothers of Joseph Chapman. The yearly sum of 20l. appeared to have been considered as a charge on the real estate, and was paid out of the rents and profits by Daniel Chapman during his life, and afterwards for five years by his devisees, the brothers of the defendant, who, however, then refused to continue the payment; and from that time till December 1833, Joseph Chapman paid the sum himself, but then refused to continue it any longer.

The information charged that Daniel Chapman possessed himself of the personal estate of George Perkins, to an amount more than sufficient to purchase the necessary sum of stock.

The information was filed against Joseph Chapman, and the vicar and churchwardens of Barrow, and prayed that Joseph Chapman might be decreed to purchase a sufficient quantity of 3l. per cent. consols to produce 20l. a year, to be applied for the charitable purposes by the said will directed, and might also be decreed to make good the arrears of the said annuity from the last payment thereof; and that if the

Court should be of opinion that Joseph Chapman ought not, under the circumstances aforesaid, to be taken to have admitted assets of Daniel Chapman come to his hands sufficient for the purposes aforesaid, and if Joseph Chapman should not admit assets sufficient for that purpose, then that an account might be taken of the personal estate and effects of Daniel Chapman come to the hands of Joseph Chapman.

Joseph Chapman, by his answer, stated, that this sum was at first regarded as a charge on the real estate of Perkins, and that he (Chapman) afterwards paid the annuity, on the supposition that he was liable to pay it without reference to the amount of the assets of Daniel Chapman, which he stated were not enough to buy sufficient stock to produce an annuity of 20*l.* per annum.

Mr. Pemberton and *Mr. Blunt* appeared for the information.

Mr. Kindersley and *Mr. Williams*, for the defendant Chapman, contended, that the payments which had been made by Joseph Chapman ought not to be taken as an admission of assets of Daniel Chapman; or that, at all events, there was merely an admission of sufficient assets to pay the annuity, and not to pay the principal sum.

Mr. Stevenson appeared for the vicar and churchwardens.

The MASTER OF THE ROLLS said, that under the circumstances of the case, he thought *Mr. Chapman* had rendered himself liable to purchase such a sum of stock as would produce an annuity of 20*l.*, and to pay the arrears, and his Lordship decreed accordingly.

V.C. }
Dec. 5. } BIGNOLD v. AUDLAND.

Interpleader—Multifariousness.

A bill of interpleader, which raises or tenders a question for decision between the plaintiff and one of the defendants, cannot be sustained.

A bill by a party in possession of money belonging to one of several claimants, against such several claimants, tendering for the

decision of the Court a question as to the amount of the money which the plaintiff is liable to pay, cannot be sustained as a bill in the nature of an interpleading bill, and is demurrable for multifariousness.

This case is reported on the original bill and demurrer, in 9 *Law J. Rep.* (N.S.) Chanc. 266.

The plaintiff amended his bill, by stating that Noverre died intestate and insolvent, and without having pleaded to the action, whereby the same became wholly abated, and not capable of being revived, so that no costs of suit could be recovered in respect thereof: that although the policy was executed by Noverre and two other directors, yet the Norwich Union Society were the parties liable to pay the amount; and charging, that the society was entitled to require the defendants, Audland and Moser, and the defendant Ward, to interplead; and that inasmuch as the society was bound not only to pay the amount recoverable upon the policy, but was also bound to indemnify Noverre or his estate, in respect of all costs and damages incurred in respect of the policy, they were entitled to stand in the place of Noverre, as such surviving party to the policy, and to require the defendants to interplead in like manner as Noverre, if alive, or his personal representative, if any such there had been, would have been;—that the plaintiff, on behalf of the society, submitted to be bound, and answerable to the defendants Audland and Moser, for all costs and charges, if any, which they would be entitled to against Noverre or his estate;—that the society were not liable to pay, and the defendants Audland and Moser were not entitled to recover interest at 5*l.* per cent., on the amount of the policy, to be computed from three months after the death of Whitelock, the assured, as the said defendants alleged, for that interest was not recoverable upon a policy of assurance, when made before the passing of the act 3 & 4 Will. 4. c. 42; and the plaintiff submitted, that inasmuch as the society had been in no default in respect of the payment of the sum due on the policy, but had been always ready and willing to pay, and had the money ready to pay the same, they ought not to be held liable to pay such

interest for any part of such period, but more particularly, at all events, not for and during such time or period as the said sum was deposited in the Court of Exchequer. No other material alteration was made in the bill by the amendment, and the prayer remained substantially the same as before, except that the plaintiff thereby, on behalf of the society, submitted to pay such further sum on account of interest on the amount of the policy, as the Court should direct, and also such sum in respect of any costs and charges as the defendants would be entitled to as against Noverre or his estate.

The bill was accompanied by an affidavit, that the plaintiff, and, to the best of his belief, the directors, treasurers, managers, solicitors, or agents of the Norwich Union Society, did not, nor did any of them, collude with any or either of the defendants, touching the matters in question, but that the plaintiff exhibited his bill as secretary, in performance of his public duties merely, of his own free will, to avoid on behalf of the society being sued or molested, touching the same matters.

The defendants, Audland and Moser, demurred for multifariousness, want of equity, and defect of parties.

Mr. Jacob and Mr. Walker, for the demurrer.—The affidavit states, that the bill is filed by the plaintiff, of his own free will. The act enabling the company to sue in the name of their secretary, does not authorize him to sue "of his own free will" for the company. The bill seeks to have the question of the liability of the company, as to interest, judicially determined, at the expense of the defendants; and also to have the decision of the court of equity, as to the liability of the society, in respect of the costs of the abated action at law. The representatives of Noverre ought to be parties; and, taken as other than a bill of interpleader, it is clearly multifarious.

Mr. K. Bruce and Mr. Anderdon, for the bill.—The objection taken as to the affidavit, if it were valid, is not within the causes of demurrer assigned on the record, and must, therefore, be considered as a demurrer *ore tenus*. The affidavit, however, only goes further than is necessary; it is not a part of the bill, or a matter that

can be objected to, if it avers the absence of collusion. Courts of equity must be considered to know something of the law, at least so much as to know that if the party dies before plea, the action abates, and no costs can be recovered. As parties, who have in their possession money of which they are substantially trustees, the society is entitled to the assistance of the Court, to be relieved of the trust. This is especially the case where money is the subject of the trust. The trustee is not to be subjected to all the casualties of the custody. Even in the case of land charged with portions for infants, where the time of payment is not arrived, and the parties are entitled to the security of the estate, the owner of the land may yet come to have it disencumbered of the trust. If the allegation, that the claimants are entitled to interest, be sufficient to exclude a bill of interpleader, there will be few cases in which parties can be compelled to interplead. The bill is not strictly a bill of interpleader; it is a bill in the nature of interpleader. The allegation of the death of a person insolvent, makes it unnecessary to have any representative of such person before the Court—*Seddon v. Evans* (1).

The VICE CHANCELLOR.—The first question in this case seems to be, whether this is a bill of interpleader or not? The rule is thus stated, by Lord Redesdale, in the 2nd (2) and subsequent editions of the *Treatise on Pleading*:—"Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them." The same view of the subject is taken by Sir J. Leach, in *Mitchell v. Hayne* (3). In that case, an auctioneer had filed a bill, against the vendor of an estate which he had sold, and against the purchasers, and sought an injunction to restrain an action which had been commenced against him to recover the deposit. Sir J. Leach makes this observation upon that case:—"Inter-

(1) 9 Law J. Rep. (n.s.) Chanc. 341.

(2) Page 47.

(3) 2 Sim. & Stu. 63.

pleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of 87*l.* 18*s.* 9*d.*, and claims against both the defendants, to retain 27*l.* 16*s.* 10*d.* for his commission and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of 60*l.* 1*s.* 11*d.*, which he desires to pay into court. But the bill itself states, that the action which is threatened by the defendant, the purchaser, is for the whole deposit of 87*l.* 18*s.* 9*d.*, and not for the sum of 60*l.* 1*s.* 11*d.* only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and if he seeks an injunction, must obtain it, not upon the principle of interpleader, but upon an order for time, or upon the answer." Therefore it is quite clear, that in the opinion of Sir J. Leach, where a plaintiff represents not merely that he has a sum to which two persons may have adverse rights, but further, that there are questions to be litigated adversely between himself and one of them, that is not a case of interpleader. In this case, the plaintiff, representing the Norwich Union Society, has filed a bill, stating a policy of insurance granted by that society upon the life of a particular person, and the bill is against the executors of that person, who is deceased, and against a person claiming the sum due on the policy, by virtue of some transactions between himself and the assured. The bill then represents that there is a question about interest on this policy, which question the plaintiff, by his bill, offers to have decided between himself and one claimant; and, therefore, I think he has an adverse claim in respect of the subject-matter for which he has filed this bill; and according to Lord Redesdale and Sir J. Leach, he has plainly shewn that it is not a case of interpleader. How, then, does the matter stand? If it is not a case of interpleader, the plaintiff has no right to ask, on this bill, against these defendants, that any question shall be decided with respect to any claim that

Ward may have;—with that the executors have nothing to do. The bill is singularly framed in this respect. It raises a question between the society and the executors of the assured, in regard to the costs of an action brought against Noverre, the survivor of the three directors who signed the policy. That is a matter between the society and the executors, and is a question in which Ward is not in any manner interested. The bill thus mixes up the claim of Ward, with the claims of the other defendants, as to costs and interest. I think it cannot be deemed to be a bill of interpleader, and taking it not to be so, it is evidently multifarious; and the demurrer must, therefore, be allowed.

M.R.
Dec. 7, 8, 13. } STEPHENSON v. DOWSON.

Specific Legacy—Ship—Freight—Stock.

The owner of certain ships bequeathed to J. R. "all his ships and parts of ships, and money, which at the time of his decease should be due and owing to him from any person or persons whomsoever." The testator, before his death, had entered into a charter-party, under which certain freight was earned by one of his ships, but the engagement comprised in the charter-party was not completed till after the testator's death:—Held, that the freight was not so incident or so annexed to the ship as to pass to the legatee of the ship as part of his specific legacy.

*The testator also gave to J. R. and his assigns, for and during his life, for his and their use and benefit, all the dividends, interest, and annual proceeds which should accrue due and become payable after his decease, for and in respect of all such stock and property as he should have and be entitled to at the time of his decease in the government or public funds or securities. At the time of the testator's decease, he had 10,600*l.* 19*s.* 3*d.*, 3*l.* per cent. consols, standing in his name at the Bank:—Held, that the bequest was specific.*

In this case, Thomas Rowe, by his will, dated the 29th of March 1822, gave and bequeathed unto his son John Rowe, all

his ships and parts of ships, and money, which at the time of his decease should be due and owing to him from government, or from any person or persons whomsoever, to and for his own use and benefit absolutely. In another part of the will, the testator, Thomas Rowe, gave unto his son John Rowe and his assigns, for and during his life, for his and their use and benefit, all the dividends, interest, and annual proceeds which should accrue due and become payable after his decease, for and in respect of all such stock and property as he should leave, or be entitled to at the time of his decease, in the government or public funds or securities, with remainder to the issue of John Rowe; and in case he had no issue, then in remainder to the plaintiff and other persons in succession, in the said will mentioned. The testator appointed his son John Rowe, the defendant W. D. Dowson, and N. D. Easum (deceased), executors of his will, and died on the 21st of September 1822, possessed of considerable personal estate, and, amongst other things, of a ship called the *Borodino*, which, by virtue of a charter-party, dated the 29th of July 1822, had been chartered to certain persons of the name of Sheddon, in respect of a voyage to St. John's, New Brunswick, which was not completed till after the testator's death, viz. in January 1823. The testator was also, at the time of his death, possessed of a sum of 10,600*l.* 1*9s.* 3*d.*, 3*l.* per cent. consolidated bank annuities, standing in his name in the books of the governor and company of the Bank of England. John Rowe, on the death of the testator, entered into possession of the testator's real and personal estate, and died on the 2nd of March 1830, without issue. The plaintiff, on the death of John Rowe without issue, became entitled to such of the testator's estate as was not absolutely bequeathed to John Rowe, and he filed his bill against W. D. Dowson and Dixon and Margaret his wife, she being the administratrix of John Rowe, and against other parties, seeking the ordinary accounts of the testator's estate and effects. In the month of December 1832, certain inquiries were directed by the Court as to the identity of the plaintiff, and the Master having made his report thereon, dated the 30th of April

1833, the cause came on for further directions in November 1833, when, after making a declaration of the plaintiff's right, the Court directed the usual accounts to be taken. The Master, by his report, (amongst other things,) found, that the testator did not die possessed of any personal estate, which he had not specifically bequeathed by his will; and he also found, that the sum of 10,600*l.* 1*9s.* 3*d.*, 3*l.* per cent. consolidated bank annuities, as also the sum of 827*l.* 0*s.* 5*d.*, due from the Messrs. Sheddon to the testator's estate, in respect of the freight of the ship *Borodino*, were also specific legacies. To this part of the Master's report both parties excepted.

Mr. Pemberton and *Mr. Purvis*, in support of the plaintiff's exception to that part of the Master's report which found the sum of 827*l.* 0*s.* 5*d.*, the amount of freight earned by the ship *Borodino*, to be a specific legacy, contended, that freight did not become due till a ship returned from its voyage; and that, in the present case, there was nothing due to the testator, in respect of the freight of the *Borodino*, at the time of the testator's decease, but that such freight became due, according to the charter-party, to the testator's estate after his decease; that John Rowe could never have recovered the amount due in respect of the freight, either as a specific bequest or as an incident to the ship, though he might have recovered possession of the ship; that in *Kerswill v. Bishop* (1), the mortgagee of the ship took possession before the voyage was completed, and no charter-party existed in that case; that where a ship-owner has entered into a special contract, as in the present case, his common law lien is gone, and he cannot maintain an action of *assumpsit*, as appears from the case of *Cowell v. Simpson* (2). The other cases cited, on behalf of the plaintiff, were—

Splidi v. Bowles, 10 East, 279.

Deane v. M'Ghie, 4 Bing. 45; s. c.

5 Law J. Rep. C.P. 44.

Schack v. Anthony, 1 Mau. & Selw. 573.

The Trinity House v. Clark, 4 ibid. 288.

(1) 2 Cro. & Jer. 529; s. c. 1 Law J. Rep. (N.S.) Exch. 227.

(2) 16 Ves. 275.

Mr. Kindersley and Mr. Lewis, for the defendants, claiming the amount of the freight as an incident to the ship bequeathed to John Rowe. The case of *Splidt v. Bowles* went on the legal rights of the transferee of the vessel to recover the freight under the charter-party. In *Morrison v. Parsons* (3), the assignment took place after the vessel had sailed; and it was held, that the right to the freight subsequently accruing belonged to the assignee of the ship as incident thereto. In *Kerswill v. Bishop*, the question was, how far it was necessary for the mortgagee to take possession of the ship. If the defendants are not entitled to the freight as an incident to the ship, they are entitled thereto, as comprised in the words, "debts due and owing to the testator at the time of his death." The cases cited on behalf of the defendants were—

Carr v. Carr, 1 Mer. 541.

Davidson v. Case, 5 Mau. & Selw. 79.

Mr. Kindersley and Mr. Lewis, in support of the defendants' exception to the Master's report, finding the sum of 10,600*l.* 1*s.* 3*d.*, 3*l.* per cent. consols, to be a specific bequest, cited—

Sibley v. Perry, 7 Ves. 522.

Simmons v. Vallance, 4 Bro. C.C. 345.

Bronsdon v. Winter, Amb. 57.

Parrott v. Worsfold, 1 Jac. & Walk. 594.

Mr. Pemberton and Mr. Purvis, contra, insisted, that the legacy in question was clearly a specific one, and could not be distinguished from the bequest of the horses, which a testator might have in his stables at the time of his death; that *Parrott v. Worsfold* was questionable as an authority; and that the point in discussion before the Court there was, not whether a testator could make a specific bequest of what he does not possess at the date of his will, but whether a testator can devise such stock as he may have at the time of his death.

THE MASTER OF THE ROLLS.—The question certainly does not appear to me by any means free from difficulty; but, nevertheless, I have come to a conclusion, which I do not think I shall alter by further con-

sideration; I will now state it. On the 2nd of March 1822, the testator in this cause was the owner of the ship *Borodino*, and other ships, and by his will, which was made on that day—[his Lordship read that part of the will relating to the bequest of the testator's ships to John Rowe]. Some time after the date of the will, and on the 29th of July 1822, the testator executed a charter-party, and he stipulated that the ship *Borodino* should go on a certain voyage, in consideration of certain freight, which was to be paid when the voyage was completed in the manner therein mentioned. The ship proceeded, and was engaged in the voyage on the 21st of September 1822, when the testator died, and in January 1823 the voyage was completed; the voyage being completed, the freight was then payable, and amounted to the sum of 827*l.* 0*s.* 5*d.*; and the question raised on the exception is, whether the freight passed to the legatee of the ship, or whether it is assets for the payment of the testator's debts, and, if so, in what manner? The Master to whom the cause was referred, appears to have considered the freight was a debt due to the testator at the time of his death, and in that sense was assets, as part of the estate for the payment of debts, but that it was a specific bequest to John Rowe. Now the freight, being assets, would have contributed to the payment of the testator's debts, in common with other specific legacies. To that report the plaintiffs have excepted, on the ground, that the freight was not a debt due at the testator's death, and not a specific bequest; and the defendants, the representatives of Rowe, have excepted, on the ground, that it was incident to the property of the ship; and as the ship was bequeathed to Rowe, the freight has now become part of the legacy of the ship. Now, I am of opinion, the freight was not a debt due to the testator, at the time of his death. The benefit of the contract, which is on a service to be performed by one party, may give rise to a debt, as the contract may or not result in a debt, so long as the service remains unperformed: but it cannot be considered as a debt due and owing, until the service has been performed. It is said, that what arises from a prospect, or expectation of a debt to be derived under a charter-party

by the use of a ship, is to be considered as annexed and incident to the ship, and therefore as passing by a legacy of the ship; and under certain circumstances it has been decided, it would pass to a mortgagee in possession, or a vendee of the ship after a sale; and it has been contended, that after the death of the testator, the executors have entire power over the chattel by which the freight is made, which, without their assent, does not pass to the specific legatee. In this case, the testator entered into a certain engagement in respect of the use of the ship. I think the executors' authority, so to use their power over the ship by a complete performance of this engagement, has not been controverted. It has been argued, that the legatee might refuse to perform the testator's engagement; if so, the reason for the exercise of the power by the executors was so much the greater; the freight was to be earned by the use of the ship, pursuant to the contract of the testator, and the performance of the contract was a duty which the legatee had imposed on him, and the legatee could only receive the ship as a legacy, subject to being used in the manner contracted for by the testator. In this state of things, are we to consider the freight so attached to the ship, that it belongs to the legatee of the ship under that bequest? I have no doubt the freight, under other circumstances, might be the subject of a specific bequest; but the question is, whether, the will not mentioning freight to be earned, the freight earned under a charter-party, made after the will, passed by the bequest of the ship. The ship, being as it was a portion of the testator's estate at the time of his death, we must consider it as a chattel in respect of which a liability subsisted, and by means of the use and employment of which freight was to be earned. It is impossible to suppose, that the testator intended the other specific legatees to pay the liabilities and expenses incurred in earning the freight, by the specific legatee of the ship; but independently of that, can it be said that the ship and the freight, which the ship was in the course of earning at the time of the testator's death, are one undivided specific portion of the testator's estate? It is said, that the property of the ship passes to the legatee, and so it does

with the assent of the executor; by such assent the legatee becomes the owner. But is that applicable to the case of freight earned under a charter-party, which the legatee cannot recover by an action in his own name, but must sue for it in the name of the executors, who have been made trustees for him, and bound in equity to lend him their names for that purpose? A demand which is payable by other persons to the testator's estate, is capable of being a specific bequest; but can freight be described as part of the testator's estate, when it remained to be earned by the performance of the testator's contract, at the expense of the testator's estate? It is said, truly, in ordinary circumstances the freight is incident to the ship; but that freight may be separated from the ship is clear, from a great variety of cases that may be put. The question in such a case is, whether, at the time of the testator's death, the testator meant the freight which cannot be separated from the other parts of the testator's estate, to be attached to the possession of the ship as a specific bequest. Upon the best consideration that I can give to the case, I think the freight of the ship does not appear to be so incident, or so annexed to the ship in this case, as to be given to the legatee as part of his specific legacy.

There is another of these exceptions, which I did not give my opinion upon on a former day—it was as to a specific legacy of stock. [His Lordship here read that part of the will containing the bequest to J. Rowe, of the stock, &c. belonging to the testator at the time of his decease.] That bequest has been found by the Master to be specific; and it is objected to such finding, that it is not a specific legacy, because it refers to such stock as the testator had at the time of his decease, and does not apply in terms to such stock as the testator had at the date of his will. The argument at the bar on behalf of the defendants was, that there could not be a specific legacy of anything, which the testator had not at the date of his will. I am of opinion that this proposition cannot be maintained, for a specific legacy is something distinguished from the rest of the testator's estate; and if it can be specified and distinguished from the rest of

the testator's estate, at the time of his death, that is enough. The question, whether a legacy is specific, implies the question of ademption, or at least very much so; but I think it has not been anywhere laid down, that there can be no such thing as a specific legacy, which the testator himself sufficiently specifies and distinguishes from all the rest of his property, at the time of his own death. Certainly we have continued instances of specific things of that nature being given. The case put by Chief Baron Richards, of a bequest of the horses which the testator had in his stable at the time of his death; the common case of a bequest of all the plate which should be at a certain house, at the time of the testator's death, or of a library or collection of books which the testator should have in a particular room, or of all the testator's wearing apparel and things of that sort, which I believe never have been doubted as being specific legacies, are directly in point, and consist of things which are distinguished and separated from all the rest of the testator's estate at the time of his death. I am therefore of opinion, that this is a specific legacy.

M.R. }
Dec. 10, 11. } WELLS v. GIBBS.

Arrest—Abolition of Imprisonment for Debt Act, 1 & 2 Vict. c. 110—Orders of Equity Courts for Payment of Money—Jurisdiction—Contempt.

Where the plaintiffs in a cause obtained an order, directing the payment by a defendant of a sum of money into court, and entered a memorandum or minute of such order with the senior Master of the Court of Common Pleas, pursuant to the provisions contained in the act 1 & 2 Vict. c. 110, and afterwards attached the person of the defendant upon process of contempt, for non-obedience to the order:—Held, upon the motion of the defendant to be discharged from custody, or that the memorandum or minute of the order might be ordered to be vacated, that the Court had no jurisdiction over the senior Master of the Court of Common Pleas, to order him to vacate the same.

Semhle—If the Court had jurisdiction in such a case, it would not be necessary for

the Court to make any order vacating the memorandum.

If the defendant offer proper terms, and is willing to give security which the plaintiffs ought to accept, this Court may exercise such jurisdiction in the case as it possesses, in order not to leave the defendant in custody.

The defendant in this case moved the Court to be discharged out of the custody of the warden of the Fleet prison; and that an entry made by the senior Master of the Court of Common Pleas, of an order made by his Lordship in this cause, dated the 11th day of June 1840; or that an entry of a memorandum or minute of that order, in pursuance, or pretended pursuance, of the act of parliament, 1 & 2 Vict. c. 110, might be cancelled or vacated for irregularity, and as not being authorized by or within the meaning of the said act; or that the plaintiffs might be declared to have relinquished all right to the benefit of any security they might have obtained or be entitled to under the said act, by means of the order of the 11th of June 1840; and that the plaintiffs might be declared to have forfeited the same. The order of the 11th of June 1840 was the common order, requiring the defendant Gibbs, within a month from that time, to pay into the Bank, with the privity of the Accountant General of the Court, to the credit of the cause, the sum of 1,404*l.* 2*s.* On the 3rd of July 1840, the plaintiffs caused a memorandum or minute of the order of the 11th of June 1840 to be left with the senior Master of the Court of Common Pleas, pursuant to the act 1 & 2 Vict. c. 110. s. 19. By virtue of an order of his Lordship, dated the 7th of November 1840, and of the warrant of the Lord Chancellor, dated the 12th of November 1840, issued in pursuance of the last-mentioned order, the defendant Gibbs was, on the 16th of November 1840, taken into custody by the serjeant-at-arms; and by an order of the Vice Chancellor, dated the 18th of November 1840, the defendant Gibbs was ordered to be turned over to the custody of the warden of the Fleet prison, for non-payment of the sum of 1,404*l.* 2*s.* By the 13th section of the act 1 & 2 Vict. c. 110, a judgment at law

is made to operate as a charge on real estate. By section 16, securities which have not been realized by the judgment creditor are to be deemed as having been relinquished, if the debtor be afterwards taken in execution. By sections 18 and 19, all decrees and orders of courts of equity, whereby any sum of money, or any costs, charges, or expenses, shall be payable to *any person*, are made to have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses shall be payable are to be deemed judgment creditors within the meaning of the act; but no such judgment, decree, or order was to affect real estate otherwise than as before the passing of the act, unless a minute or memorandum of such judgment, decree, or order should be left with the senior Master of the Common Pleas, &c.

Mr. Kindersley and *Mr. Evans*, in support of the motion, contended, that the order of the 11th of June 1840, by which a sum of money was made payable by the defendant "*into court*," and not to any *particular person*, was not within the meaning of the act of 1 & 2 Vict. c. 110: that an order of the Court, to pay a sum of money to an individual, was an adjudication, settling the rights of parties; but that was not the case with an order to pay a sum of money "*into court*": that if such an order as the one in question should be determined by the Court to be within the meaning of the act of 1 & 2 Vict. c. 110, then the defendant ought to be discharged from custody under the 16th section of that act, by which it was provided, that in cases similar to the present the judgment creditor should be deemed to have relinquished all right and title to the benefit of his security, and should forfeit the same accordingly: and that the memorandum or minute of the order of the 11th of June 1840 ought to be directed by the Court to be vacated, and not to be permitted to continue as a charge binding the debtor's estates.

Mr. Pemberton and *Mr. Hallett*, *contrà*.—Allowing the order in this case to have been duly registered, and the party afterwards taken in execution, there would be no ground for discharging the party, who, by his non-obedience to the writ of the

Court, has been guilty of a breach of the peace. The act in question has not abolished imprisonment for debt except on mesne process. It has given the creditor a more extensive remedy against the lands of the debtor, if he accept the same, instead of proceeding against his person. The effect of the act is, that the creditor who takes his debtor in execution is deprived of the right of proceeding against his lands; but this Court has no jurisdiction given it by the act to order the entry made by the senior Master of the Court of Common Pleas to be vacated, or the defendant to be discharged out of custody. There is no similarity between the suing out a writ of *capias ad satisfaciendum* at common law, and the issuing of process of contempt out of this court against a party for non-obedience to its order; for, in the latter case, you cannot obtain a writ of sequestration until the remedy against the person is exhausted. If the present case be not within the act of the 1 & 2 Vict. c. 110, then the entry of the minute of the order, made by the senior Master of the Court of Common Pleas, is actually null and void, and cannot create a charge. The case, however, is within the meaning of the act, as explained by the construction clause; otherwise, the greater part of the orders made by the Court would be deprived of the benefit of its provisions; for in original decrees of this Court against trustees, &c., the orders are always to pay the money into court, and not to particular parties. It is a subtlety to say, that money ordered to be paid into the Bank of England is not an order to pay it to any person; for nothing is more common than to say to your debtor, Pay the amount into a particular bank, which means, pay it to some one of the partners constituting the bank, or to their agent. This Court can have no possible jurisdiction over an officer of the Court of Common Pleas.

The MASTER OF THE ROLLS.—I am asked to do several things in this case, which, it appears to me, I have no jurisdiction to do. I have endeavoured, during the discussion, so to shape the application, as to bring it within the cognizance of this Court; and I must consider it as a motion that the plaintiff may vacate the memo-

randum which he has entered with the senior Master of the Court of Common Pleas; or, in case he neglect to do that, that I may discharge the order which places the defendant in contempt.—[His Lordship here detailed the facts of the case.] This is the most extraordinary application made by way of motion that I ever heard of. It is argued, first, that an order for payment of money into the Bank is not such an order as is within the scope of the act 1 & 2 Vict. c. 110. It is then said, that if it is not within the act, then there has been an improper entry made; and therefore this Court will order the memorandum to be vacated. It is next said, that if the order be within the scope of the act of parliament, then it was irregular to attach the person of the defendant after the memorandum was entered; and that such a proceeding was a forfeiture of the charge; and that the order for commitment of the defendant ought to be discharged by the Court, if the Court should decline ordering the memorandum to be vacated. Now, all the proceedings taken in this court to compel payment of the amount due, have been perfectly regular; and it is upon these proceedings I am asked to discharge the defendant from custody, and to deprive the plaintiff of the means of enforcing the order obtained by him, upon the ground that the plaintiff has done something else which he ought not to do, or of which he had no right to avail himself. I feel some satisfaction that it is not necessary for me to determine whether this order for the payment of money into court is or is not within the provisions of the act; because, whether it be so or not, I possess no authority to interfere in the way in which I am requested to do by this motion; for, without some authority being given me by the act over the officer of the Court of Common Pleas, I have no power over him. Presuming, then, the order in question to be within the scope of the act of parliament, the next question that arises will be, is caption of the defendant such a taking of the person in execution as is meant by the act? for if it be, it would undoubtedly be a forfeiture of the plaintiff's benefit to the charge: and if it be a forfeiture, then the question is, can I declare a forfeiture in this matter? The act enacts, that if the party who has

obtained the benefit of the charge shall, before the security has been realized, take the person of the defendant in execution, he shall be deemed to have relinquished the benefit of the charge; and upon that would arise the rather curious question, whether the taking the defendant upon process of contempt in this court, is a taking in execution within the meaning of the act. The process of contempt in this court is certainly not the same as in the proceedings on a writ of *capias ad satisfaciendum*; nor is this Court controuled by the rules which bind a court of law, viz. that you cannot simultaneously pursue your remedy both against the person and the property of the defendant. From the earliest time, it has been the practice of courts of equity to issue the process of sequestration against the defendant's estate, and, at the same time, to attach the defendant's person. This was a serious matter in early times; but the proceeding against the estate and person of the defendant at the same time, was finally determined to be valid. The question whether caption on process of contempt is to be considered a caption in execution under the act, I am relieved from deciding; for I do not consider that, upon a motion of this kind, I am called upon to make such a declaration as is asked by the defendant. Supposing, however, I actually had jurisdiction over the officers of the Common Pleas, I must be fully satisfied that what the defendant asks to have done is necessary, and that there is a defect in the act of parliament; but the 16th section of the act says, "such judgment creditor shall be deemed to have relinquished all title to the benefit of such charge or security, and shall forfeit the same accordingly." If so, what more can be done? Can I be asked, then, to relieve the defendant from some imaginary cloud which he may suppose to hang over his title? This is not the case of a defendant who asks for time, in order to satisfy the duty which is required of him, and of a plaintiff who resists the application; for in such a case, I ought to assist the defendant by the exercise of any jurisdiction I may possess in the matter: but here, the case is one of a party who pertinaciously neglects to obey an order which the Court has made; and he now asks me to do that which belongs to another jurisdiction. I must

refuse this application, with costs. At the same time, if the defendant were to enter into terms, and offer a security, which I think the plaintiffs ought to accept, I would exercise such jurisdiction as I may possess, in order not to leave the defendant in prison. This would only be consistent with what has been constantly done in cases where, the defendant being in contempt, sequestration would issue; but upon the defendant giving proper security, the plaintiff has been made to come to terms.

V.C. }
Dec. 12. } KENT v. BURGESS.

Baron and Feme—Ward of Court—Validity of Marriage—Frame of Settlement of Wife's Fortune in a case of Contumacy—Interlocutory Proceeding.

A marriage celebrated in a foreign country, according to the rites of the Church of England, but not at the residence of a British Ambassador, or in a British factory, and not according to the lex loci, where there were no insurmountable difficulties in celebrating the marriage according to the lex loci, is invalid.

If it be necessary in the progress of a cause to determine whether the plaintiff sustains the character which he assumes, the Court may direct an interlocutory proceeding for the purpose of determining that question before the hearing of the cause.

In the case of the marriage of a ward of court, where the conduct of the husband had been marked by a contumacious disobedience to the orders of the Court, a settlement was directed to be so made, that the husband should take no interest under it, in the wife's fortune.

Richard Kent, by his will, devised and bequeathed his real and personal estate to trustees, upon trust, to sell and convert the same into money, and to stand possessed of the residue thereof, upon trust, to apply so much of the interest of the same as the trustees should think necessary in the maintenance and education of the testator's adopted daughter, Marianna Kent, until she should attain the age of twenty-one years, or be married with the consent of the trustees, and to assign and

transfer all the said trust funds (subject to the life interest of certain legatees) to and for her own use and benefit on her attaining twenty-one, or being so married; but in case the said Marianna Kent should die under twenty-one years of age, or be previously married without such consent, then upon trust for the said testator's nephews therein named, and their issue, in manner therein mentioned. The testator afterwards, by an unattested codicil, reciting that his said nephews were since dead, revoked the bequests to them, and gave certain other legacies to their children, and bequeathed all the residue to the said Marianna Kent. The testator died in January 1837, and the will and codicil were proved by his executors; and they were, by order of the Court, appointed guardians of the person of the said Marianna Kent.

In February 1838, Marianna Kent, being then about seventeen years of age, was persuaded to elope from the house of one of her guardians, with one Stephen Winkworth, but she was shortly afterwards restored to the care of her guardian, and Winkworth was committed to the Fleet, and was subsequently discharged upon his petition; he undertaking, by signing the registrar's book in court, to have no communication with her. On the 1st of May she was again induced by Winkworth to elope with him from a school at which she had been placed by her guardian. Winkworth succeeded, after the second elopement, in concealing Miss Kent from the pursuit of her guardians, and finally conveyed her to Belgium, where a marriage ceremony was performed between them in July 1838, of which the following certificate was transmitted to the Foreign Office:—

"Marriage ceremony solemnized in the English Church of Antwerp, in the kingdom of Belgium.—Stephen Winkworth, of Wynegham, in the kingdom of Belgium, bachelor, and Marianna Kent, of Wynegham aforesaid, spinster, (by and with the consent of her legally constituted guardians), were married according to the rites of the Church of England, in the English Church of Antwerp aforesaid, this 15th day of July, in the year 1838, by me,

"S. Lock, D.D., Chaplain of the said Church of Antwerp."

" This ceremony was solemnized between us.

" (Signed) Stephen Winkworth.
Marianna Kent.

" Before me,

" P. Werbrouck.

" L. Werbrouck.

" (Signed) De Hoch Larpent, British Consul, in the presence of P. Werbrouck."

The fact of the second elopement was immediately made known to the Court by the petition of the guardians, and Winkworth was ordered to attend personally; service of the order at the house of his father being ordered to be deemed good service, and upon failure to attend at the time appointed, he was ordered to stand committed for contempt.

In August 1838, Miss Kent, under the name of Marianna Winkworth, by her next friend, filed a bill, stating the said alleged marriage, and that the same having taken place without the consent of the trustees, the interests of the defendants, the great-nephews and nieces of the testator, had been affected; and praying that the same might be ascertained, and that it might be referred to the Master to approve of a proper settlement of the property of the plaintiff, and the same ordered to be executed.

A petition was presented in the name of the plaintiff, in February 1839, stating the foregoing facts as to the marriage, and that the petitioner now doubted whether the Antwerp marriage was a valid marriage, and that she was pregnant, and that to avoid all doubts in respect thereof, and as to the legitimacy of the issue, she was anxious and prayed that another marriage should be had, and that the trustees should be at liberty to consent thereto. Upon this petition, and the undertaking of Winkworth to execute such settlement as the Court should direct, liberty was given to the trustees, and the father and mother of Winkworth, to consent to a marriage, without prejudice to any question in the causes. The consents of the trustees were accordingly given, and entered with the registrar of the court on the 4th of March 1839, and the parties were married in the church of Allhallows, Barking, on the 12th of April 1839, by banns. The ceremony was again performed, on the 21st of May following, in the church of St. Saviour's,

Southwark, after banns. On the 20th of April 1839, on the petition of the plaintiff, representing the approach of the time of her confinement, and praying that her husband might not be imprisoned for the contempt, and that it might be referred to the Master to approve of a settlement, the Court directed a reference as to whether any and what valid marriage had taken place, but the order was not drawn up or dated until the 11th of June, after the third marriage ceremony had been performed. Winkworth was committed to the Fleet, but was allowed to be discharged upon finding sureties to appear when ordered. In November 1839, the plaintiff, by her next friend, filed another bill, stating the said third marriage, or marriage ceremony, with consent. The Master, by his report in July 1840, stated, that he saw no ground to prefer either of the two last marriages to the other, or to doubt that either of them, in the absence of the other, must be perfectly valid, if the Antwerp marriage were void. And the Master found, that by a copy of the Code Civil, which had been laid before him, and deposited to as being the law in force in Belgium, it appeared, that by articles 165 and 166, marriages there must be celebrated publicly before the civil officer of the domicile of one of the parties; and that by preceding articles of that Code, certain publications and notices are required to be made previously to the celebration, and an instrument, called the Act of Marriage, is to be made out, signed, and deposited in a registry at the tribunal of the arrondissement. And the Master found, that the strict observance of these forms was secured by severe penalties on the magistrate departing from them; but he did not find any article of the Code which declared a marriage void, owing to the omission of such formalities, though in some cases the same might be rendered void by the parents or relations. That by article 148, a son under twenty-five years of age could not contract marriage without the consent of his parents, and where there are no parents, by that of a family council. The Master found that Winkworth was twenty-four years of age, and that it did not appear that anything was done to supply the consent of his parents; but that a proceeding was taken to convene a family

council to appoint a tutor and surrogate tutor, which was done according to the Belgic law; but, there being no evidence of any civil marriage, the Master found that no valid marriage, according to the *lex loci*, was made at Antwerp between the parties; and that the religious ceremony was not recognized by it; but the Master, nevertheless, being of opinion that the marriage, according to the rites of the Church of England, solemnized abroad at a (so denominated) English church, by a clergyman thereof in full orders, between persons both of the age of consent, would have been a valid English marriage before the passing of the act 26 Geo. 2. c. 33; and as the act 4 Geo. 4. c. 76, repealing the former act, is by section 33 expressly confined to England, he found that the said marriage of the parties at Antwerp, was a valid marriage between them according to the law of England; but if the Court should hold the same to be invalid, then he found that the marriage of the 12th of April 1839, was a valid marriage.

The plaintiff presented her petition, praying, that so much of the report as found the marriage of the 12th of April 1839, a valid marriage, might be confirmed, and a settlement approved of; and that some portion of the property bequeathed to her might be delivered out by way of outfit and maintenance. The trustees, by their petition, prayed the confirmation of the report generally; and the petition of another defendant prayed the confirmation of so much of the report as found the Antwerp marriage to be valid.

Mr. K. Bruce, Mr. Jacob, Mr. Wigram, Mr. G. Richards, Mr. Bailey, and Mr. Menteath, in support of the several petitions, cited—

Ruding v. Smith, 2 Hagg. Con. Rep. 371.

Scrimshire v. Scrimshire, *ibid.* 395.

Harford v. Morris, *ibid.* 423.

Middleton v. Janverin, *ibid.* 437.

Compton v. Bearcroft, *ibid.* 444, n.

Lacon v. Higgins, 3 Stark. N.P.C. 178.

Swift v. Kelly (1).

(1) In the course of the argument the Vice Chancellor said:—"The case of *Swift v. Kelly* was this: the marriage took place at Rome, but the two persons being Protestants, the Vicar Apostolic refused to allow the marriage to be celebrated, until the parties had conformed to the Roman Catholic religion. There was then an apparent conformity

Story's Conflict of Laws, p. 44.

Stat. 4 Geo. 4. c. 67.

Stat. 3 & 4 Will. 4. c. 45.

Mr. West, for Stephen Winkworth.

The VICE CHANCELLOR. — It certainly appears to me, that this case is now so brought forward, that there is no reason to suppose that any further inquiry would alter the representation of the facts. I think the report must be confirmed, so far as the Master finds that there was no valid marriage at Antwerp, according to the *lex loci*, and so far as he finds there was a valid marriage in England, after the 4th of March 1839, the time at which the trustees gave their consent; it not being necessary at present to enter into the question of the validity of the marriage at Barking. My opinion is, that this case is not within the statute 4 Geo. 4. c. 91, for that statute provides for the case of a marriage solemnized by a minister of the Church of England, in the chapel or house of any British ambassador, or minister residing within the country to the court of which he is accredited, or in the chapel of any British factory abroad, or in the house of a British subject residing at such factory. Now, as there is no British factory or ambassador at Antwerp, the case cannot come within that statute. In the judgment of Lord Stowell in the case of *Ruding v. Smith*, when you look at the conclusion, you cannot but see that he is meditating on the difficulties in that case; he denominates them the insurmountable difficulties, of effecting a marriage according to the Dutch law. In this case there were no insurmountable difficulties in the way of the parties, to prevent the marriage being celebrated according to the Belgian law; and therefore it appears to me, there are no circumstances of exception here, operating to take the marriage out of the general rule, requiring it to be according to the *lex loci*. The marriage having been by the parties, and the marriage took place. When it came before Sir J. Nicholl, he decided, that the conformity on the part of the lady was simulated, and was not a sufficient conformity to make it a lawful marriage. The case was ultimately brought before the Privy Council on appeal, and the Judges there were all of opinion, that the ecclesiastical authorities at Rome were the only proper judges of whether the marriage was good at Rome; and if they thought the conformity, such as it was, was sufficient to render the marriage good, then the validity of the marriage could not be questioned."

found by the Master to be void according to the *lex loci*, and there being no ground for excepting the case from that rule, the Master's report must be confirmed in that respect, and also as to the subsequent finding, that the English marriage was good. I think the case is now in that state, that the Court may properly so far decide the questions which are raised. The matter stands in this way:—The infant's bill was filed, and pending that state of the suit the elopement and marriage took place, and then a bill was filed, in which the lady described herself as the wife of Stephen Winkworth. Then came the order of the 11th of June, and on the 13th of November 1839, the lady files another bill, in which she is described again as the wife of Winkworth. The order having been made in the two causes, the Master makes his report in all three, and it became necessary to examine how far the character of wife was sustained by the lady, at the time she filed the bill. Now, it certainly was considered by Lord Eldon, in the case which I adverted to in the course of the argument, and in which I was of counsel (2), that when the Court sees there is a preliminary question, which sooner or later must be decided, the Court may direct an interlocutory proceeding or inquiry in the first instance, to ascertain how that fact stands. In the present case, it is, it appears to me, necessary for the purpose of going on with these causes, that the Court should know in what character the lady stands. I think that if the Court finds there is such a question to

be determined, and that by an interlocutory proceeding, it can ascertain the true state of the facts, the Court has power to proceed in that manner; and though it is said that the Lord Chancellor has lately intimated a contrary opinion (3), yet I am borne out in this opinion, by the authority of Lord Eldon, upon which I have often acted in this court; and I am not aware that any decision of the point has ever been questioned or appealed from. Here, I think, an end should be put as soon as possible to this question; and that the report should be now confirmed to the extent I have mentioned. It must be referred to the Master to approve of a proper settlement of the personal estate of the plaintiff. As to the true construction of the codicil, I may now declare, that the plaintiff is entitled to the clear residue of the personal estate of the testator, subject to the gift over in case of her decease before attaining twenty-one. It may be referred to the Master to make a settlement of her property, having regard to the circumstances. It is proper to make a special direction, with regard to any interest the husband might propose to take in the settlement. There cannot be a limitation to the next-of-kin of the wife, on account of the illegitimacy. As the circumstances stand, there ought to be no interest taken by the husband during the life of the wife, and in case there should be no issue of the marriage living at her death, she should have an unlimited power of appointment.

(2) *Golden v. Ulyate*, not reported. His Honour said the circumstances were these:—The plaintiff claimed to be next-of-kin of an intestate, and filed his bill for an account. The defendant insisted that the plaintiff was illegitimate. Upon motion for a receiver in 1809, the Lord Chancellor directed an issue to try the question of legitimacy; and upon the trial of the issue, a verdict was found for the plaintiff. The defendant in 1811, applied for a new trial, which was refused. The cause was heard in 1820, when the Lord Chancellor again refused another issue which the defendant asked; and stated that he was, notwithstanding the doubts which had been expressed on the point, well satisfied that the Court had been right in directing the issue, on the interlocutory proceeding.—*Mr. Horne and Mr. Shadwell for the plaintiff. Mr. Hart and Mr. Blake for the defendant. Earl of Strathmore v. Countess of Strathmore*, 2 Jac. & Walk. 541, was mentioned on the same point. See also, per Lord Eldon, 14 Ves. 142; 18 Ves. 481.

L.C. }
May 6, 8; } LOZON v. PRYSE.
Dec. 16. }

Tithes—Gros Bois—Stat. 45 Ed. 3. c. 3.

Wood of the growth of twenty years or upwards, springing from the roots or stools of trees which have formerly been felled, are exempt from the payment of tithes.

The plaintiffs were entitled to the rectories of Llanbadarnfawr and other parishes in the county of Cardigan; and the defendant was a land-owner in those parishes. The bill prayed an account of the value of

(3) In *Gompertz v. Ansdell*, not reported, but in which the circumstances were very peculiar.

the tithes of all the wood which had been felled by the defendant in these parishes within the last six years.

The defendant admitted that the plaintiffs were entitled to the tithes of all such underwood, poles, and trees felled or cut down by the defendant as, at the respective times of the felling and cutting down thereof respectively, were not of the growth of twenty years; but the defendant insisted, that all the trees and wood which had been felled or cut down by the defendant within six years last past, and which were *gros bois*, or great wood, and were of the growth of twenty years or upwards, and grew from the roots or stools of trees which had formerly been felled or cut down, were exempted from the payment of tithes, either by the statute of 45 Ed. 3. or otherwise.

Mr. G. Richards and *Mr. Bacon* appeared for the plaintiffs; and

Mr. Wigram, *Mr. Wilson*, and *Mr. Eagle*, for the defendant.

The following authorities were referred to:—

Chichester v. Sheldon, Turn. & Russ. 245; s. c. 3 *Eag. & Y.* 1102.

Evans v. Rowe, 1 M'Cl. & Y. 577.

Walton v. Tryon, Ambl. 130; s. c. 3 Burn's Ec. L. 481; 2 Gwill. 827; 2 *Eag. & Y.* 123.

Ford v. Racster, 4 Mau. & Selw. 130; s. c. 3 *Eag. & Y.* 710.

Lewis v. Snell, Turn. & Russ. 247, n.; s. c. 3 *Eag. & Y.* 1388.

Walbank v. Hayward, 3 Wood, 512; s. c. 3 *Eag. & Y.* 1245.

Bibye v. Huxley, Bunb. 192; s. c. 2 Wood, 237; 2 Gwill. 657; 1 *Eag. & Y.* 805.

Amber v. Jackson, 3 Wood, 225.

Turnor v. Smith, 2 Gwill. 529; s. c. 1 *Eag. & Y.* 526.

Underwood v. Buckle, tried at the Hereford Summer Assizes in 1812, before Mr. Justice Bayley.

2 *Rol. Abr.* 815, pl. 10.

The King v. Minchin Hampton, 3 Burr. 1308.

Daws v. Mollins, 2 Leon. 79; s. c. 1 *Eag. & Y.* 86.

Sampson v. Worthington, cited in 11 Co. 48, b; s. c. 1 *Eag. & Y.* 152.

Selden, c. 8. ss. 28, 29, 30, 31.

Stat. 35 Hen. 8. c. 17; 11 Hen. 4. c. 40. *Coke's 2nd Inst.* 643.

Stampe v. Clinton, 1 *Eag. & Y.* 234.

Fox v. Thezton, 12 Mod. 524; s. c. 1 *Eag. & Y.* 642.

Dike v. Brown, 2 Ld. Raym. 835; s. c. 1 *Eag. & Y.* 647.

Anonymous, 7 Mod. 137; s. c. 1 *Eag. & Y.* 651.

Soby v. Molyns, Plowd. 468; s. c. Rast. Ent. 489, b; 1 *Eag. & Y.* 60.

Wray v. Clench, Cro. Eliz. 55; s. c.

Anon. Moor. 908; 1 *Eag. & Y.* 91.

Anonymous case, cited in *Lisford's case*, 11 Coke, 48; s. c. 1 *Eag. & Y.* 92.

Aubrey v. Fisher, 10 East, 446.

Ram v. Patenson, Cro. Eliz. 477; s. c. 1 *Eag. & Y.* 133.

Greenaway v. the Earl of Kent, 1 Wood, 479; s. c. 1 *Eag. & Y.* 677 (1).

The LORD CHANCELLOR said, if he found the question attended with so much difficulty that he could not come to a satisfactory conclusion upon it, he might get the decision of a court of law; but he would consider the case.

Dec. 16.—The LORD CHANCELLOR (after stating the case) said, that the question had become one of great difficulty, from the decisions which had been given upon it. In 1724, almost 400 years after the statute of Edward 3, the case of *Bibye v. Huxley* occurred, in which it was, for the first time, held, that timber growing from old stools was subject to tithe. His Lordship also referred to *Daws v. Mollins*, *Walbank v. Hayward*, *Evans v. Rowe*, *Chichester v. Sheldon*, and *Walton v. Tryon*; and stated, that although he was very reluctant to alter what had been considered by many, and particularly by Lord Chief Baron Alexander, in *Evans v. Rowe*, to be a rule of law, still he thought the interpretation which had been put upon the statute of Edward 3. for 400 years, was the correct one, namely, that this wood was exempt from the payment of tithes; and he should, therefore, dismiss this bill, but without costs.

(1) Most of these cases will be found in "The case of *Evans v. Rowe*, with observations by William Eagle, Esq.," in which the law on this question is very fully and ably discussed.

V.C. }
 Nov. 3, 4. } MADDEFORD v. AUSTWICK.

Practice.—Taking Accounts—Evidence—Effect of Answer and Examination—Objection to the Master's conduct in examinations vivâ voce.

The personal representative of a defendant, who had put in an answer and examination which was now admitted to be untrue, was not, under the circumstances, allowed to put in a further answer and examination.

The examination of witnesses vivâ voce before the Master, under the 69th order of 1828, may be the subject of objection and exception, as is the exercise of any other power given to the Master.

It is not the course of the Court to interfere with the Master's judgment in the conduct of inquiries before him, unless upon his report or certificate, regularly brought before the Court by exception.

Semble, that where a party, in his examination, denies that he had any receipts or made any payments during a certain period, and he is afterwards charged, by other evidence, with receipts during that time, he will not be allowed to give evidence of payments also made then, in contradiction to his answer and examination.

A decree was pronounced in 1827, directing certain partnership accounts to be taken; and the decree was affirmed by the Lord Chancellor on appeal in 1833. The plaintiff exhibited interrogatories for the examination of the defendant under the decree, the first of such interrogatories inquiring as to the sums received by him on account of the partnership, and the second as to the sums which he had paid. The defendant put in his answer to these interrogatories in July 1836, whereby, in answer to the first interrogatory, it was stated, that the defendant, and the clerks, carmen, and porters of the partnership, had received various sums of money, the amount of which he set forth in a schedule; and in answer to the second interrogatory, that he, and the clerks, &c. of the partnership, had made various payments, by the joint order of the partners, also set forth in a schedule thereto. The answer was held to be insufficient; and a further answer was put in by the defen-

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dant on the 2nd of January 1837, more expressly negating the receipt or payment of any sums other than those included in the schedule. According to the schedule, considerable periods of time had elapsed, and in particular the years 1816 and 1817, without any receipt or payment having taken place; the plaintiff, however, succeeded in charging the defendant, by other evidence, with the receipt of large sums of money during those periods. The defendant subsequently produced a witness for examination, in order to prove payments made on his account during the same periods. The first question put to the witness for this purpose was objected to on behalf of the plaintiff, as being offered in proof of a matter contrary to the defendant's answer and examination. The Master allowed the objection. The defendant then gave notice of a motion that he might be at liberty to carry into the Master's office such additional accounts as he might be advised, and might be at liberty to tender evidence and examine witnesses on his behalf on the taking of such additional accounts, notwithstanding such additional accounts might not have been included in his examination; or that he might be at liberty to file a further examination in answer to the interrogatories. Before the motion was heard, the defendant died; and the plaintiff having filed a bill of revivor, a similar motion was now made by the personal representative of the deceased defendant.

Affidavits were filed on both sides with regard to the circumstances, and as to the greater or less degree of difficulty the defendant Austwick was under in preparing his examination, and the time allowed him for that purpose. The object of the affidavits made in support of the motion was to shew, that the omission in Austwick's examination of the accounts for the period in question, was the result of mistake or misconception.

Mr. Jacob and Mr. Steere, for the motion.

Mr. G. Richards and Mr. L. Wigram, for the heir-at-law of Austwick, not having been served with notice of the motion, were not permitted to be heard.

Mr. K. Bruce and Mr. Roupell, contra.

P

The authorities cited were—

Order 69th of 1828.

Chennel v. Martin, 4 Sim. 340; s. c. 9 Law J. Rep. Chanc. 208.

Curling v. the Marquis of Townshend, 19 Ves. 630.

Livesey v. Wilson, 1 Ves. & Bea. 149.

Greenwood v. Atkinson, 4 Sim. 54.

Nov. 5.—The VICE CHANCELLOR.—The first question is, whether it is proper that I should now interfere with the proceedings which are going on in the Master's office. The second is, whether I ought to make any order, for the purpose of relieving the estate of Austwick from the effect which, such as it is, may have been produced by the examination he has put in. With regard to the first question, I apprehend it is not the course of this Court to interfere in every case where the parties differ as to whether the Master is right in a particular step. It frequently happens, that where the Master has any difficulty, he himself desires the parties to make an application to the Court, and the Court, upon that application, intimates its opinion for the Master's guidance; but it is not the practice of this Court, after the Master has determined upon a particular course of proceeding, that the party objecting to that proceeding should apply to this Court to overrule the Master. If the Master had made a report, and in that report stated that he had examined witnesses in a particular way, the party objecting might properly make that report the subject of an exception. The 69th new order first gave to the Master the power of examining witnesses *vivâ voce*. The conduct of the Master in the exercise of that power may be a ground of objection in the first instance, and may afterwards be made the subject of exception, as in any other matter referred to the Master before that order was made, it would have been. I should be very reluctant, on motion, to interfere, and to say, that what the Master has done with reference to the examination of a particular witness is right or wrong. The other question is, whether, if the Court does not interfere, it ought now to make some order, having the effect of or enabling the defendant to introduce other evidence before the Master. It is represented, that

Mr. Austwick did unintentionally, and from mistake, make a representation that was false; and that, having regard to the facts now made to appear, I ought to enable the present defendant, his representative, to make a case, in opposition to that which is the result of the examination already put in. Does it, then, sufficiently appear that there has been such a mistake?—[His Honour read several parts of the different affidavits relating to the circumstances which took place in the Master's office, and out of court, before and at the time of the examination being put in.] Mr. Austwick was carrying on a contest for time; and when he found that he could not obtain further time, he put in his examination recklessly, without regard to its consequences. He was dealing with the records of this court, and, doing so, was stating voluntarily what he knew to be incorrect. I do not think it is consistent with the duty of this Court to go out of its way to relieve him, or, which is the same thing, to relieve his personal representative. I think, on these affidavits, the fact sufficiently appears, that whether Austwick formed in his mind a scheme of fraud or not, still that he intended to state, and did state, that which he knew to be untrue. This Court has granted relief in cases where an erroneous statement has been introduced by mistake on the records of the court; but in the case of the solicitor which has been mentioned (1), I refused to relieve, and that decision was affirmed by the Lord Chancellor. Mr. Austwick erred wilfully; for, having notice of the necessity of accuracy, he persists in the course he had taken. The case is one in which this Court ought not to give the relief sought; and the motion must be refused, with costs.

L.C. }
Dec. 1, 6. } NEWMAN v. WILLIAMS.

Will—Bequest—Waste of Trust Fund.

*A testatrix bequeathed all the residue of her personal estate to trustees, who were also her executors, to invest and pay the income to A, for life, and after his death, to pay 1,000*l.* to B, 1,000*l.* to C, and the residue to D, E, and F. The executors*

(1) 4 Sim. 54.

*ascertained the residue, and invested it as directed by the will. The surviving executor afterwards applied part of the trust fund for his own use:—Held, that the loss which was thus occasioned, must be borne pro rata by all the legatees; and that the legatees of 1,000*l.* were not entitled to their legacies in full.*

Ann Phillips, by her will, dated the 2nd of January 1813, bequeathed all her personal estate to John Thomson and William Scott, upon trust, to invest and pay the income to the testatrix's son, N. T. Phillips, for his life, and in the event (which happened) of her son not having any son who should attain twenty-one, then she gave the said trust estate and the unapplied part (if any) of the interest and dividends which should arise therefrom, after the decease of her said son, in manner following—viz. the sum of 1,000*l.* unto the widow of her said son, if he should leave one, the sum of 1,000*l.* unto her sister, Elizabeth Painter, the sum of 1,000*l.* to John Thomson, and all the residue unto Philip Phillips, the brother of her late husband, Rebecca Phillips, his sister, and Mary Jones, his niece, daughter of his sister Elizabeth Jones, or such of them as should survive her, the said testatrix, and their, his, or her executors, administrators, and assigns; and she appointed John Thomson and William Scott executors of her will.

The testatrix died in 1815, and it appeared from the Master's report, that the residue of her estate had been ascertained by her two executors, and invested by them in the purchase of 5,250*l.* navy 5*l.* per cent. annuities, which were afterwards converted by act of parliament into the same amount new 4*l.* per cent. bank annuities.

William Scott survived his co-trustee, John Thomson, and sold out 5,000*l.* new 4*l.* per cent. bank annuities, and applied the proceeds for his own use. In January 1830, Scott became bankrupt, and two sums, amounting together to 2,449*l.* 4*s.* 9*d.*, were paid by his assignees, in respect of the money due from him to the trust estate, and had been invested in the purchase of 2,854*l.* 4*s.* 7*d.*, 3*l.* per cent. consols, and the 250*l.* 4*l.* per cents. had been converted into the same amount of new 3½*l.* per

cents.; and these two sums constituted all the trust fund which now remained.

C. S. Williams, the first defendant on the record, had been appointed by the Court as a trustee of the fund, in the place of W. Scott.

N. T. Phillips, the son of the testatrix, died in December 1835, unmarried.

The plaintiffs were the personal representatives of John Thomson, the legatee of 1,000*l.*; and the defendants were Mr. Williams, (the trustee,) the executor of Elizabeth Painter, the other legatee of 1,000*l.*, Philip Phillips, and Mary Jones, who was also the executrix of Rebecca Phillips.

The bill prayed, that the legacy of 1,000*l.* given to John Thomson, together with interest from the death of N. T. Phillips, (the tenant for life,) might be paid to the plaintiffs, and that a sufficient part of the trust funds might be sold for this purpose.

The principal question in the suit was, whether the loss which had arisen from the breach of trust committed by Scott, ought to be borne proportionably by all the persons entitled to the said trust fund, or whether the two first-mentioned legacies of 1,000*l.* ought to be paid in full, and the ultimate loss be thrown upon the parties to whom all "the residue" was bequeathed. The Master had found in favour of the claim of the legatees of 1,000*l.*, to be paid in full.

The cause now came on for further directions. No exceptions had been taken to the report.

Mr. Bethell, Mr. Romilly, and Mr. Stuart, for the legatees of 1,000*l.*, contended, that this case was not different from ordinary cases of a deficiency of assets, and that in cases of such a description, the residuary legatees must lose the benefits which were intended for them: and that the case of *Dyose v. Dyose* (1) must be treated as overruled.

Mr. Wigram and Mr. W. M. James, for the legatees of the residue, insisted, that the residuary legatees ought not to suffer by a *devastavit* committed after the residue had been ascertained: that the Master had found that the clear residue had been

(1) 1 P. Wms. 305.

ascertained before the *devastavit*, and that from that time Scott ceased to act as executor, and became a trustee, and that all the *cestuis que trust* must bear the loss *pro rata*.

Page v. Leapingwell, 18 Ves. 463.

Ex parte Chadwin, 3 Swanst. 380.

Byrchall v. Bradford, 6 Mad. 13, 235.

Phillips v. Munnings, 2 Myl. & Cr. 309.

Willmott v. Jenkins, 1 Beav. 401.

Mr. Bethell replied.

December 6.—THE LORD CHANCELLOR.
—This case was that of an executor who was guilty of a *devastavit*. It was a question between the residuary legatees and the particular legatees. The party who has occasioned the loss, is one of the executors who was also a trustee; "and if he retained the legacies in his hands, not as assets of the testatrix, but as trustee of the legacies, then the principles which would apply to another trustee, must apply to him. He is no longer clothed with the character of executor, but is as to the legacies a mere trustee" (2). In this case, the party who made default, has thrown off the character of executor, and has assumed that of trustee. It is true, the amount of some of the shares is specified, and the gift to others is of the residue of the personal estate. When the testatrix made her will, the amount of the trust fund was not ascertained; the amount of all the shares could not, therefore, be specified; but when the estate was administered, and the residue invested, all the shares were ascertained, and the executor became the trustee of the fund for such *cestuis que trust*, and on such trusts; and it is in such shares that the losses must be borne. In *Sleech v. Thorington* (3), the gift of the remaining part of the stock was as specific as the gift of the other. *Page v. Leapingwell* and the other cases referred to, all establish the rule upon which this case must be decided: and the fund being that of all the parties, they may have their costs as between solicitor and client.

(2) 6 Mad. 241. His Lordship also referred to *Ex parte Chadwin*.

(3) 2 Ves. sen. 560.

L.C. }
Dec. 8, 9, 15. } In re WILLIAM BAINES.

Ecclesiastical Law—Contempt—Certificate of Contumacy—Church-rate—Habeas Corpus.

A certificate of the contumacy of a party, in a cause depending in the Arches Court, is rightly issued by and in the name of the official principal.

The certificate stated, that the party was contumacious, in not obeying the lawful commands to pay the sum of 2l. 5s. rated and assessed upon him, and 125l. 3s. costs, pursuant to a monition duly issued, and by not paying those sums pursuant to the said monition, in a certain cause or business of subtraction of church-rates, the proceedings wherein were carried on in pain of his contumacy:—Held, that it might be competent to the Ecclesiastical Court to proceed in the manner here intimated, by condemning an absent party duly cited to the payment of the sum for which the suit was brought; and that it sufficiently appeared that the subject-matter of the suit was within the jurisdiction of that Court, although the sum claimed was under 10l.

It appeared by the writ, that it "was delivered of record to the sheriff of Leicester-shire, before the Queen at Westminster:—" Held, sufficient, and that it need not appear on the face of the writ, that it was "opened" and "delivered" "in the presence of the Justices," according to the words of the act 5 Eliz. c. 23. s. 2.

The Court of Chancery will not interfere with the decrees of Ecclesiastical Courts, on the ground, that the proceedings there were irregular, provided the subject-matter of the suit was within their jurisdiction.

A motion was made before the Lord Chancellor, that William Baines, who had been imprisoned for the non-payment of church-rates, and had been brought up on a *habeas corpus*, should be discharged.

Mr. M. D. Hill and *Mr. Mellor* appeared in support of the application, and *Mr. Wigram* and *Mr. Wightman* opposed it.

A similar application had been previously made to the Court of Queen's Bench; and the judgment of that Court, and also the particulars of the case, will be found fully

reported in 10 *Law J. Rep.* (N.S.) Q.B. 34.

All the objections raised before the Lord Chancellor were considered by the Court of Queen's Bench. In addition to the cases mentioned in the report of this matter in the other court, the following authorities were referred to:—

Burn's Ecclesiastical Law, tit. 'Schools,' 'Chancellor.'

Nash's case, 4 B. & Ald. 295.

Clarke's Praxis, tit. 20.

Bro. Abr. tit. 'Certificate of Bishop.'

Pole v. Godfrey, 2 Buls. 266.

The Queen v. Harris, Holt, 658.

The King v. Watson, 2 Lord Raym. 817.

Sheffield v. the Archbishop of Canterbury, 2 Show. 146.

Fitzherbert's Nat. Brev. with *Hale's Commentary*, 1755, note b, p. 149, citing *Year Book*, 11 H. 4. 64, a.

2 *Burn's Ecclesiastical Law*, 250, 254.

Anonymous, Cro. Jac. 566.

Anonymous, Vent. 338.

John Parker's case, Cro. Car. 583.

The King v. Theed, Lucas, 350; s. c. 1 Stra. 43.

Burgoyne v. Free, 2 Hagg. Ec. Rep. 494.

Doe v. Parmiter, 2 Lev. 81.

Horsy v. Daniel, *ibid.* 161.

Cameron v. Lightfoot, 2 W. Black. 1190.

Watson v. Thorpe, 1 Phill. 277.

Bruyeres v. Halcomb, 3 Ad. & El. 381; s. c. 4 *Law J. Rep.* (N.S.) K.B. 228.

Dec. 15.—The LORD CHANCELLOR overruled all the objections, and ordered the prisoner to be remanded.

V.C. }
Dec. 15. } COCHRANE v. ROBINSON.

Executor—Leasehold Estate—Covenant—Indemnity.

The Court will not order an executor or personal representative to execute an assignment of leasehold premises belonging to the estate of his testator, unless he be indemnified against any past or future breaches of cove-

nant in respect of such premises, notwithstanding that there is no evidence of any such breach, that the executor has never been in possession, and that the premises have been sold under the decree of the Court.

David Nevin, by his will, made in 1827, devised and bequeathed to trustees, their heirs, executors, administrators, and assigns, all his real and personal estate not thereinbefore disposed of, to hold the same unto the use of the said trustees, their heirs, executors, administrators, and assigns, upon trust that they and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, should, as soon as conveniently might be after his decease, sell and dispose of all his said freehold and leasehold estates and trust premises, either by public sale or private contract, for the best price that could be gotten for the same, and pay, apply, and dispose of the monies thence arising, in the first place, in payment of his debts, funeral and testamentary expenses, and the legacies given by his will, and to divide the residue of the said monies among the sons and daughters of his brother A. Nevin, in the proportions therein mentioned; and the testator declared that the receipts of his trustees, or the survivor of them, or of the heirs, executors, or administrators of such survivor, should be sufficient discharges to the purchaser or purchasers of the said trust premises.

The testator died in October 1831, and the trustees, who were also his executors and executrix, proved his will. The plaintiff and others interested under the will, filed their bill for the administration of the testator's estate.

Two of the executors and devisees in trust died, leaving Lucy Nevin, the survivor of them, who died in 1839, having made her will, and devised all mortgage and trust estates vested in her at the time of her death, to C. North, subject to the equities and trusts affecting the same, and appointed him sole executor of her will; and he thereby became the legal personal representative and trustee for sale both of Lucy Nevin and of the original testator; and the suits were continued against him by revivor and supplement.

By the decree made on the 22nd of

November 1839, it was ordered, that the leasehold estates therein mentioned, being part of the estate of the testator, should be sold with the approbation of the Master, wherein all proper parties were to join as he should direct, and the money to arise by the sale be paid into court, with the other usual directions. Certain leasehold premises were accordingly sold to different purchasers. The sales were confirmed by the Court, and an inquiry was directed, whether the defendant, C. North, was entitled to any and what indemnity in respect of his executing assignments to the purchasers. The Master, by his report, stated, that in the lifetime of the survivor of the trustees and executors of the original testator, a receiver of the outstanding personal estate and of the rents of the said leasehold estates had been appointed, and that C. North had not entered into possession of the leasehold estates of the testator; and the Master certified, that he was of opinion that C. North was not entitled to any indemnity upon the execution of the assignments of the said leasehold premises. The plaintiffs then presented a petition to confirm this report; praying that C. North might be ordered to execute the assignments of the leasehold premises to the purchasers, and that he might be ordered to pay the costs of the petition.

Mr. Stuart and Mr. J. Parker for the petition.

Mr. K. Bruce, for C. North, insisted, that he, as the representative of Lucy Nevin, the surviving executrix of the testator D. Nevin, would be answerable, as the estate of Lucy Nevin would also be, to the extent of the assets which he or she parted with, and did not appropriate in payment of debts, arising from any breaches of covenant, either past or future, in respect of the leasehold premises; and that, therefore, C. North was entitled to an indemnity from the residuary legatees in respect of any assignment of the premises to which he might be a necessary party. The decree of the Court, directing him to assign, would be no protection from the consequent legal liability resulting from that act; and any qualification of the terms of the assignment, by making it "so far

as he lawfully can or may," would not prevent it from having a legal operation, and passing the term at law.

Simmons v. Bolland, 3 Mer. 547.

Hawkins v. Day, *ibid.* 555, n.; s. c. Amb. 160.

Norman v. Baldry, 6 Sim. 621.

The VICE CHANCELLOR.—In my copy of *Mr. Merivale's Reports*, opposite to the case of *Simmons v. Bolland*, there is a note of the case of *Vernon v. Lord Egmont* (1), which resembles the present case, and in which it was held, that the trustee was entitled to an indemnity. It appears to me, that in this case the executor ought not to be compelled to part with the leasehold estate, without receiving some indemnity against any possible case which may arise, whereby the assets of the testator may be charged. It would be unjust towards the executor. I do not see how I can escape from the rule adopted in the case of *Vernon v. Lord Egmont*. I cannot confirm this report. The defendant is entitled to an indemnity; and it must be referred to the Master to approve of the terms of such indemnity.

V.C. { THE ATTORNEY GENERAL,
Dec. 14, 15. { AYLWIN AND OTHERS v. THE
EAST INDIA COMPANY.

Pleading—Information and Bill—Demurrer—Amendment—Charity.

To an information and bill, by the Attorney General on behalf of a charity, at the relation of persons who were also plaintiffs, a general demurrer was put in:—Held, that as the plaintiffs did not state a title to any individual relief, the demurrer must be allowed, although there appeared to be a title to relief, in so far as it was sought upon the information for the benefit of the charity only.

That in the latter case, leave should be given to amend generally; but not to remove any of the plaintiffs to the bill from continuing as relators.

(1) His Honour was pleased to allow a copy of this note to be taken at the bar. It precisely corresponds with the case of *Vernon v. the Earl of Egmont*, reported 1 Bli. N.S. 554.

By the will of Nicholas Gybson, made in 1540, and by a surrender by his widow, and enrolment on the rolls of the manor of Stebbonheath, otherwise Stepney, in 1552, certain premises at Radclyff, were vested in the master and wardens of the commonalty of the freemen of the Mystery of Coopers, and their successors, upon trust for certain charitable purposes, and among others, for establishing a school, and for maintaining a certain number of almsmen and almswomen. The Coopers' Company, in 1770, granted a lease of part of the premises to the East India Company, for a long term of years. The present suit was commenced by an information and bill by the Attorney General, at the relation of G. A. Aylwin, R. Carter, and R. Dowding, who were members of the court of assistants of the Coopers' Company, and of J. Casheer, one of the almsmen, and Mary Thomas, one of the almswomen of the charity, the five relators being also plaintiffs,—against the East India Company and their secretary, and the lessees or assignees in whom the premises in question had become vested, and also against the Coopers' Company; and it prayed a declaration that the lease of the premises made in October 1770, by the Coopers' Company to the East India Company, was obtained from the Coopers' Company fraudulently, and that it might be set aside; and that the execution of it by the court of assistants of the Coopers' Company, was a breach of trust by the persons then forming such court; and that the derivative lease or assignment of July 1773, might be declared to be invalid, and delivered up to be cancelled, and that an occupation rent might be put on the premises, and the defendants, the East India Company, and the lessees or assignees, might be decreed to account; and that the full annual improved value might be applied by the defendants, the Coopers' Company, for the benefit of the charity.

All the defendants, except the Coopers' Company, demurred generally, for want of equity.

Mr. K. Bruce, Mr. Jacob, and Mr. Lloyd, for the demurrer.

Mr. Richards, Mr. Bethell, Mr. Willcock, and Mr. Hubback, in support of the information and bill.

The cases cited, were—

The Attorney General v. Vivian, 1 Russ. 226.

Rhodes v. Warburton, 6 Sim. 617.

The Attorney General v. Cross, 3 Mer. 524.

The Attorney General v. Owen, 10 Ves. 555.

The Attorney General v. Brooke, 18 Ves. 320.

The Attorney General v. Green, 6 Ves. 452.

The Attorney General v. Hungerford, 2 Cl. & Fin. 357.

The VICE CHANCELLOR.—It appears to me, that so far as the information on behalf of the charity is concerned, there is a sustainable case.—[His Honour then expressed his opinion with reference to the effect of the statements of the bill, as shewing the identity of the tenements included in the surrender and comprised in the lease; and also as to the effect of the words by which the trusts of the surrender were expressed.] The difficulty which appears to me to exist on this record, is, that the persons who are made plaintiffs, do not appear to have the smallest particle of interest individually in the subject of the information. With regard to Aylwyn, Carter, and Dowding, there is this statement, that they "are respectively members of the Court of Assistants of the Coopers' Company;"—it does not appear whether there are more members of the court of assistants;—"and that the court of assistants is the governing body of the company; and that the plaintiffs, as members of such court, act as trustees of the charity, and are respectively bound duly to administer the funds of the charity for the benefit thereof." Now, it is plain, that persons cannot be bound to do that which is impossible, and, therefore, if they simply represent that they are bound to administer, *prima facie* I must take it with respect to them that they can administer; and if so, I do not see for what purpose the record is brought forward in the form in which it is, as an information as well as a bill. If, however, it is to be taken that the state of the case is such that it does require an information by the Attorney General, then, as it appears to me, there

is no particle of individual relief or benefit asked by the bill.

What is asked is, "That it may be declared that the lease of the 30th of October 1770, was obtained from the Coopers' Company through fraud, and that the same may be declared to be fraudulent, and may be set aside for the benefit of the charity; and that it may be declared that the execution of the lease was a breach of trust on the part of the persons constituting the court of assistants of the Coopers' Company at the time of the execution of the lease, and that the same lease, and the derivative lease or assignment of the 31st of July 1773, may be declared invalid, and may be delivered up to be cancelled, and that a proper occupation rent may be put upon the premises," for the time past; "and that the full annual improved value of the premises may be received by the Coopers' Company, and applied and administered by them for the benefit of the charity;" and then that certain individuals "may be decreed to deliver up possession of the premises to the Coopers' Company;" and that the plaintiffs, not individually, but on behalf of the charity, may have general relief.

On the face of the record, therefore, there is no sort of relief whatever asked by these persons who are named as the plaintiffs; and I cannot but think, that if it is to be taken as an instrument which seeks any relief for them individually, there is the objection which was taken at the bar, *ore tenus*, namely, that other parties who stand in the same character ought also to be parties. It appears to me the record is wrong, in having joined as co-plaintiffs persons, who, upon the face of the record, as they have framed it, have asked nothing for themselves, and do not shew that they are individually entitled to anything. I think that this, being a demurrer to the information and bill, must be allowed, if it is sufficiently shewn that the information and the bill cannot be sustained together; and I am of opinion they cannot; but there being, as I have said, apparently a case for relief in substance, it will be right to give leave to amend.

[*Mr. K. Bruce.*—It is to be understood that the present plaintiffs are to continue

on the record; they are not to be withdrawn from being relators.]

The VICE CHANCELLOR.—The amendment is not to extend to the removing of any of the plaintiffs from the record.

V.C. }
Dec. 16. } WHITE v. RIGG.

Practice.—24th Order of 1833—Order for enlarging Publication, Construction of—Notice to cross-examine.

Where publication is enlarged until the first day of a term, it is not irregular for the parties to examine their witnesses on that first day of the term.

Quære—Whether an order by the Master for enlarging publication, is within the 24th order of 1833.

There being an original bill and a bill of revivor in this cause, the solicitor of George Rigg and Elizabeth his wife, two of the defendants to the original bill, on the 7th of May, caused notice to be given to the plaintiff's solicitor, of a rule to pass publication, the time for which would have expired on the 13th of May. The cause not being at issue as between the parties to the bill of revivor, the plaintiff's solicitor obtained a warrant before the Master, which was attended by both solicitors, on the 12th of May, when the Master ordered that publication should be enlarged until the first day of Michaelmas term then next, and that the plaintiff should pay the costs of the application, which were paid accordingly. On the 30th of October, witnesses on behalf of the plaintiff were brought to the examiner's office for examination, and all of them, except one, were examined on that day. The examination of that witness was continued on the 2nd of November, which was the first day of Michaelmas term. Notice of the names and examination of the witnesses was given to the plaintiff's solicitor, on the 30th of October. On the 5th of December, the defendants G. Rigg and wife, gave notice of motion, that the depositions might be suppressed for irregularity. After receiving this notice, the plaintiff's solicitor caused

the Master's order of the 12th of May to be drawn up, which had not been previously done.

Mr. Jacob and Mr. Koe, for the motion.
Mr. K. Bruce, contra.

The ground of the application was, first, that the order enlarging publication not having been drawn up, was, in fact, abandoned as inoperative—3 & 4 Will. 4. c. 94. s. 13, order 24, 21st of December 1833 (1);—and, secondly, that the order, if it extended to, did not include the first day of Michaelmas term; and that the notice of examination on the 30th of October, did not afford the defendants forty-eight hours for cross-examination, before the time of passing publication,—the 1st of November being a Sunday.

The VICE CHANCELLOR said—The fact of the order not having been drawn up, was not any ground for holding it to be inoperative. The defendants had accepted the costs of that publication, and the order had been acted upon; so far at least that no step was afterwards taken with reference to publication until the time then allowed had expired. The case was not within the 24th order; and the motion must be refused, with costs.

Order accordingly.

L.C. }
Dec. 2, 3. } CLARKE v. CORT.

Bankrupt—Debt—Contract—Set-off.

A. executed a mortgage in favour of his bankers, M. & B, to secure any balance which might at any time be due upon his banking account, either to them or to the persons who should for the time being constitute the banking firm. A. became indebted on his account with M. & B, and also, after B's death, with M. & D, and in 1838, the

(1) That the Master to whom any such application or reference as aforesaid shall be made, shall draw up the orders thereon in a short form, and the same, when signed by him, shall be entered in a book to be kept for that purpose in the office of such Master, and shall then be marked by the said Master or his chief clerk, as entered, and he shall sign his initials thereto in this form:—"Entered, A. B.," and the said orders shall then be binding, &c.

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balance on his account exceeded 3,000l., when the banking business, with all debts and securities due to or held by the firm, was assigned to the plaintiffs. They afterwards employed A, and became indebted to him for work and materials. A. became bankrupt; and the property comprised in the mortgage was not sufficient to pay the balance due from A, after paying off several prior incumbrances, the amount of which had not yet been ascertained:—Held, that the plaintiffs were entitled to set off the debt due from them to A, against the balance due from A. to the banking firm.

In 1837, Samuel Grocock kept a banking account with Messrs. Mansfield & Babington, of Leicester, and by indentures of lease and release of the 18th and 19th of August 1837, he conveyed some freehold hereditaments to trustees, (subject to some prior mortgages,) upon trust to sell, as mentioned in the indenture of release, and the surplus of the proceeds, after discharging the prior incumbrances, was to be applied in the payment to Messrs. Mansfield & Babington, "or either of them, or to such person or persons with whom they or either of them should at any time or times thereafter become partners or partner in the said business of bankers, or who for the time being should constitute the firm of the said banking-house, or carry on the business thereof, or to their, his, or her executors, administrators, or assigns respectively," of all monies in which, in the course of any transactions between Grocock and the banking-house, he should become indebted to Messrs. Mansfield & Babington, "or either of them, or to such person or persons, &c." (using the same words as before).

In November 1837, Mr. Babington died, and his interest in the bank determined; and in January 1838, Mr. Mansfield was joined in the banking business by Mr. Dalby, and in January 1839 Mr. Mansfield died.

By an indenture of the 16th of July 1839, the executors of Mr. Mansfield, together with Mr. Dalby, assigned to the plaintiffs all the monies, stocks, funds, securities, and effects of Mansfield & Dalby, and Mansfield & Babington respectively, and all mortgages, bonds, spe-

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cialties, bills, notes, and other securities held by the said several co-partnerships, or any of them.

Grocock continued his accounts with the banking-house during the changes which took place among the partners; and when his account was balanced on the 31st of December 1838, a sum of 3,014*l.* was due from him to Messrs. Mansfield & Dalby. No further transactions took place in his account after that time, except that two sums amounting to 144*l.* due to him from Mr. Mansfield, were by the direction of Grocock deducted from that balance.

In December 1839, Grocock became a bankrupt, but previously to his bankruptcy he had been employed by the plaintiffs as a builder, to make some alterations in the premises where the banking business was carried on, and his bill on this account amounted to 959*l.*

The plaintiffs had sold the hereditaments comprised in the mortgage of 1837; and the proceeds after satisfying the prior incumbrances, the amount of which had not been ascertained, would not exceed 1,300*l.*

The assignees commenced an action against the plaintiffs, to recover the 959*l.* due from them on account of the works done for them by the bankrupt, and the plaintiffs thereupon filed this bill, praying a declaration that the amount which was sought to be recovered in the action, ought to be set-off *pro tanto*, against the amount due from Grocock's estate on the balance of his banking account; and also praying for an injunction.

The plaintiffs obtained a common injunction for want of answer.

On the answer coming in, the defendants obtained an order from the Vice Chancellor, on the 1st of December 1840, dissolving the injunction.

The plaintiffs now moved before the Lord Chancellor, that this order of the Vice Chancellor might be discharged.

Mr. K. Bruce, Mr. Wigram, and Mr. James Parker, appeared in support of the motion.

Mr. Stuart and Mr. Daniell, contra, contended, that the debt due from the plaintiffs to Grocock, was a legal debt, but that the claim which the plaintiffs had against Grocock's estate, was merely an

equitable claim arising from an assignment to them of a legal debt contracted by Grocock to the parties who had formerly carried on the banking business; and that as the two debts were of different characters, the plaintiffs were not entitled to a set-off.

The following cases were cited:—

O'Connor v. Spaight, 1 Sch. & Lef. 305.

Row v. Dawson, 1 Ves. sen. 331.

Ryall v. Rowles, *ibid.* 348; s. c. 1 Atk. 165.

Bishop v. Church, 3 Atk. 691.

Ex parte Flint, 1 Swanst. 30.

Lord Lanesborough v. Jones, 1 P. Wms. 325.

Gale v. Luttrell, 1 You. & Jer. 180.

Ranking v. Barnard, 5 Mad. 32.

Wake v. Tinkler, 16 East, 36.

Tucker v. Tucker, 4 B. & Ad. 745; s. c. 2 Law J. Rep. (N.S.) K.B. 143.

Dec. 3.—The LORD CHANCELLOR.—The deed of 1837 provides for the past and future transactions and dealings of Grocock and Mansfield & Co., and it provides, that the security shall enure for whomsoever should carry on the business of Mansfield & Co., for all monies due in respect of such transactions. The plaintiffs are now the persons filling that situation; they are not merely therefore assignees of a legal debt without the privity of the debtor, but they are assignees of the debt, for whom the debtor contracted that the security should enure. The property has been sold, and the amount of debt—the result of the transactions and dealings—is admitted to be unascertained. The plaintiffs, therefore, are, as assignees of this debt, and by contract, entitled to what is so due, and to the application of the proceeds of the property in part payment. The case, therefore, is not that of a mere assignee of a legal debt coming into equity, to have the benefit of a set-off, which he could not have at law; it is not therefore necessary to consider what would be the decision in such a case; but *Williams v. Davies* (1) goes much further than such a case would be. If the security had been more than sufficient to

(1) 2 Sim. 461.

pay the debt, no question could have been made, but that the plaintiffs would have a right to come into this court to have the amount ascertained, and to have the debt liquidated by application of the property charged. The jurisdiction cannot be affected by the amount of the security. As equity recognizes the assignee of a debt as the creditor, and as these demands, if both were recoverable at law, would be the subject of set-off, so, if equity has jurisdiction on the subject-matter, it will enforce the set-off. The plaintiffs had a demand against Groocock before he became bankrupt, in respect of which they are entitled to sue in this court. They, therefore, in this court, are entitled to set off the legal debt which they owe to Groocock; and such was the case of *O'Connor v. Spaight*. The relative position of the parties was established before the bankruptcy; that event, therefore, does not affect the question. And for the reasons I have given, I am of opinion the plaintiffs are entitled to the benefit of the set-off in equity, to which, if they had been originally creditors, instead of the assignees of the debt, they would have been entitled at law. The injunction must be continued.

GENERAL RULES WITH REGARD
TO AFFIDAVITS.

Practice.—Costs.

Dec. 11, 1840.—The VICE CHANCELLOR said, that the rule of the court, and the opinion and practice of all the Masters was, that on the taxation of the costs of petitions, where affidavits in support or opposition, or both, had been filed, the costs of all such affidavits should be allowed, whether they or any of them had been read or not at the hearing of the petition; unless special directions with reference to any such costs were given, in the order made upon the hearing of the petition.

Dec. 24, 1840.—The VICE CHANCELLOR said, that the following rule would be adhered to: "That where a defendant had given notice of motion to dissolve an injunction, the plaintiff should not be allowed to file affidavits at such a time as to have the effect of postponing the motion; and that, if at the time when the motion came on to be heard, it was allowed to stand over at the request of the plaintiff, the plaintiff should not be at liberty to read any affidavit which might have been filed during the interval of the motion standing over, and the subsequent hearing of it."

END OF MICHAELMAS TERM, 1840.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

HILARY TERM, 4 VICTORIÆ.

L.C. }
July, 1840. }
Jan. 15, 1841. } BAGOT v. BAGOT.

Settlement—Separate Estate—Baron and Feme—Trust—Costs.

M. B., previously to her marriage with *W. B.*, was entitled to certain real estates on which a quantity of timber was afterwards felled, producing the clear balance of 942*l.* 3*l.* per cent. consols. By the settlement on her marriage, those estates were covenanted to be settled to the use of four trustees, (of whom *E. A. B.* and *R. L.* were two,) and the settlement was for a term of ninety-nine years, if *M. B.* and *W. B.* should so long live, without impeachment of waste, in trust to receive the rents, issues, and profits, and after discharging the outgoings, to pay the residue to such persons, and for such uses, as *M. B.* should alone, and from time to time, and without her husband, as if she were sole, but not by way of anticipation, by any drafts, notes, orders, or writings, signed by her own proper hand, appoint; and in default thereof, to pay the same to *M. B.*, for her separate use, exclusive of her husband, who was not to intermeddle therewith, nor were the said rents, &c. to be subject to his debts or con-

troul; with remainder to *W. B.* for his life; with remainders over.

The trustees in 1836 appointed *W. B.* receiver of the settled estates, and *M. B.* signed a paper writing, dated the 16th of December 1836, authorizing the trustees to pay 200*l.* per annum only of the rents to herself, and the remainder to *W. B.* The then trustees presented the paper writing to *M. B.* for her signature. *M. B.* afterwards signed another paper, dated the 15th of April 1837, by which she revoked the former paper writing, and directed the payment of the rents to her separate use, according to the provisions of the settlement. This was afterwards communicated to the trustees, two of whom endeavoured to keep *M. B.* bound by the terms of the paper of the 16th of December 1836, which obliged *M. B.* in January 1838, to give notice to the then manager of the estates not to pay the rents to *W. B.* On one of the other two trustees (*Baker*), who was friendly to *M. B.*, intimating his intention to receive the rents, a notice was served on the tenants and the manager, in the name of *W. B.*, not to pay any rents except to some one authorized by all the trustees. The Court afterwards, on motion, appointed the trustee *Baker*, the receiver, without salary.

W. B. claimed the sum of 942l. consols, on the ground, that if he survived M. B. he would be tenant for life, without impeachment of waste; and the two hostile trustees insisted that M. B. had parted with her interest in that sum, by agreeing that the timber should be cut down, and the proceeds applied in payment of W. B.'s debts. The same trustees throughout the transactions endeavoured to aid the husband, W. B., in defeating the wife's enjoyment of her separate estate:—Held, that the decree was right in ordering those trustees and W. B. to pay the costs of the suit, the same having been rendered necessary, by the unfounded claims of the husband, W. B., improperly recognized and supported by those two trustees.

Held, that the decree was also correct in continuing the receiver previously appointed by the Court, no motion having been made to discharge him from that office, and it being absolutely necessary to appoint new trustees.

Held also, that W. B. and the two trustees hostile to M. B. were properly ordered to pay the costs of the parties interested in remainder under the settlement, and who were not necessary parties to the suit, inasmuch as they, on the part of W. B., set up the claim to a tenancy for life in the timber money, which raised a question, (however untenable,) in which the other persons entitled in remainder were interested.

In this case, the bill was filed by Martha Bagot, by her next friend, Sir W. Pilkington, and by Sir W. Pilkington against Egerton Arden Bagot, Richard Levett, George L. Baker, and Joseph Phillimore, the trustees acting under the plaintiff's marriage settlement, and against William Bagot, the husband of the plaintiff, T. H. Mortimer, and M. M. S. Pilkington, T. E. Pilkington, George Lord Rodney, and Philip Jones. It appeared, that on the marriage of the plaintiff, Martha Bagot, with the defendant, William Bagot, articles for a settlement were executed, dated the 27th of December 1820, whereby, Martha Bagot and William Bagot severally covenanted, that in case the intended marriage should take effect, they would effectually convey certain estates situate in Herefordshire and Monmouthshire, and at Hackney, in the county of Middlesex, to

the use of the trustees, for the term of ninety-nine years, if Martha Bagot and William Bagot should so long live, upon trust to pay the rents and profits as Martha Bagot alone, and as if she were unmarried, should from time to time (but not by way of anticipation) by any drafts, notes, orders, or writings signed by her own proper hand, direct and appoint, and in default of such appointment, to pay the same for her own sole and separate use, and exclusive of the said William Bagot, who was not to intermeddle therewith; and after the determination of the said term of ninety-nine years, and in the meanwhile subject thereto, to the use of the said William Bagot, for his life, with remainder to certain trustees during the life of the said William Bagot, to preserve contingent remainders, and after the decease of William Bagot, to the use of Martha Bagot for life, without impeachment of waste, with remainder to the use of the same trustees during the life of Martha Bagot, to preserve contingent remainders, and after the decease of the survivor of them, the said Martha Bagot and William Bagot, to the use of trustees, for the term of 1,000 years, for the raising portions for younger children; and subject thereto, the estates were conveyed to the use of the children of the marriage, as Martha Bagot and William Bagot, her husband, should jointly appoint, and in default of such appointment, the same were to go to the first and other sons of the marriage, in tail male, with remainders over to other persons, and the ultimate remainder was to Martha Bagot and her heirs; and it was provided by the settlement, that it should be lawful for the said Martha Bagot, at any time during her life, notwithstanding her intended coverture, and whether covert or sole, with the consent of the said Egerton Arden Bagot and the other trustees, (naming them,) or of the survivors or survivor, his executors or administrators, or of the trustees to be substituted by any deed signed by her, as well as the parties consenting, in the presence of, and attested by two or more credible witnesses, to revoke, alter, and change the trusts thereinbefore declared, of the messuages and hereditaments, or shares and property of the said Martha Bagot,

thereby agreed to be settled, other than the Hackney property and leases under the powers therein contained, and to limit the said hereditaments to such other uses as the said Martha Bagot, with such consent as aforesaid, might think fit. The marriage took place shortly after the execution of the articles, and the trustees accepted the trusts thereof. Two of the four original trustees died, leaving the defendants, their co-trustees, Egerton Arden Bagot and Richard Levett, them surviving, and in the year 1836, E. A. Bagot and R. Levett induced the plaintiff, Martha Bagot, in the absence of professional assistance, to concur with them in appointing William Bagot the receiver and manager of the settled estates. At a meeting held in December 1836, a memorandum in writing was drawn up by the solicitor of William Bagot, with the approbation of the surviving trustees E. A. Bagot and R. Levett, authorizing W. Bagot to act as such manager and receiver, which was signed in the first place by the two surviving trustees, and afterwards by the plaintiff, after she had been told by Richard Levett that she might revoke the same at any time; and thereupon on the 16th of December 1836, a memorandum was drawn up by the direction of the said E. A. Bagot and R. Levett, on the same piece of paper, and signed by them respectively, whereby they authorized the said William Bagot to act as such manager and receiver. William Bagot shortly afterwards entered into the receipt of the rents and profits of the settled estates, and took upon himself the management thereof, and in pursuance of such authority, deputed one William Fowler as his agent, and at a salary, to collect the rents from time to time down to Midsummer, 1837. By an indenture dated the 17th of March 1837, indorsed on the articles of settlement, C. J. V. Tynte and G. L. Baker were appointed new trustees, to act with the two surviving trustees, in the place of the two deceased trustees. During the time the settled estates were under the management of William Bagot, and before the appointment of the new trustees, a proposition was made to the plaintiff, Martha Bagot, by W. Bagot, with the authority of E. A. Bagot and R. Levett, that a quantity of timber should be felled,

from the settled estates, and sold in order to raise a fund to pay certain debts and engagements of William Bagot, to which the plaintiff, Martha Bagot, assented; and accordingly, a large quantity of timber was felled by the direction of the said William Bagot, and with the concurrence of E. A. Bagot and Richard Levett, amounting in value to nearly 4,000*l.*, and the proceeds were received by them, and part thereof was afterwards paid by the direction of the plaintiff Martha Bagot, into the banking-house of Messrs. Drummonds, in the joint names of G. L. Baker, on behalf of the plaintiff, Martha Bagot, and of T. H. Mortimer, as the solicitor, and on behalf of William Bagot, to be disposed of by them according to such directions as they might from time to time receive from the trustees, under the articles, and the plaintiff Martha Bagot, on the 5th of April 1837, signed a written direction or authority to that effect. A great part of the money arising from the sale of the timber felled, was appropriated by the trustees with (the plaintiff) Martha Bagot's consent, towards the payment of the debts of William Bagot; and at the time of filing the bill, there was a balance of 869*l.* 16*s.* 9*d.*, which the plaintiff had requested to be paid over to her for her separate use, for urgent purposes, but to which E. A. Bagot and Richard Levett objected. The plaintiff being dissatisfied with the management of the settled estates by William Bagot, and feeling assured that the memorandum she had signed was an improper one, and ought not to have been signed by her, she, on the 15th of April 1837, signed a memorandum in writing of that date, which was afterwards communicated to the trustees of the settlement and to William Bagot, and by which she revoked the memorandum of the 16th of December 1836, and directed the trustees to apply the rents of the settled estates to such persons as she from time to time by any drafts, notes, orders, or writings signed by her, should direct or appoint. Disputes and differences having arisen between William Bagot and the plaintiff Martha Bagot, and between her and the said E. A. Bagot and R. Levett, respecting the management of the settled estates, and the application of the rents thereof; and the four trustees

differing amongst themselves, as to the management of the settled estates, and the application of the rents and profits thereof, difficulties were about Midsummer, 1837, raised by the said E. A. Bagot and Richard Levett, as to the future receipt of the rents of the settled estates, whereupon Martha Bagot gave directions to and authorized G. L. Baker to receive such rents, (Joseph Phillimore, a trustee, appointed on the 14th of April 1838, in the place of C. J. V. Tynte, having consented thereto). G. L. Baker (who had agreed to receive the rents without commission,) communicated by letter such authority and directions to the said E. A. Bagot and Richard Levett, and requested their consent thereto, but they refused the same, and proposed that William Fowler should continue to receive such rents, to which the said Martha Bagot objected. In July 1838, G. L. Baker gave notice to the said E. A. Bagot and R. Levett, of his intention to receive such rents, under the authority given him by the said Martha Bagot; and he also gave notice to the tenants to attend and pay the rents to him; but the said E. A. Bagot and Richard Levett, after receiving intimation of such intention to receive the rents, immediately, and on the 10th of July 1838, gave notice thereof to the said William Bagot, and the said William Bagot caused a written notice to be given to and served on the tenants of the said settled estates, requesting them not to pay their rents to any person except such as should be appointed to receive the same by the four trustees of the settlement. E. A. Bagot and Richard Levett not only objected to G. L. Baker receiving the rents of the settled estates, (although he had the consent of Joseph Phillimore, a co-trustee, so to do,) but declined to receive the rents themselves, or to execute the trusts of the articles of settlement for the separate use of the said Martha Bagot; afterwards, and with the approbation of G. L. Baker and Joseph Phillimore, the plaintiff, Martha Bagot, proposed a person of the name of Ward to receive the rents of the settled estates; but E. A. Bagot and Richard Levett objected to such appointment, and in consequence of such objection, the rents of the said settled estates, which accrued due between

Midsummer 1837 and Midsummer 1838, remained unpaid. William Bagot had not contributed anything towards the maintenance of Martha Bagot since that time, and in order to provide necessaries for the support of herself and the keeping up of her establishment, Martha Bagot had been obliged to borrow money on the credit of the arrears of her separate estate, and she had accordingly procured a loan from Sir William Pilkington, of 250*l.*, and another loan from G. L. Baker, of 700*l.*, which sums respectively remained unpaid. G. L. Baker and Joseph Phillimore were willing that the balance of 869*l.* 16*s.* 9*d.* should be paid to Martha Bagot, for her separate use, under the trusts of the settlement, but T. H. Mortimer, acting under the direction of William Bagot, E. A. Bagot, and Richard Levett, refused to concur in such payment. There were issue of the marriage several children, of whom Thomas E. Pilkington was the first tenant in tail of the settled estates in remainder expectant on the determination of the several estates for life, created by the settlement. Martha Bagot submitted, that under the limitations of the settlement, she was entitled to be put into the receipt of the rents and profits of the said settled estates, and ought to be at liberty to name and appoint her own agent to receive such rents for her separate use, but that William Bagot, E. A. Bagot, and Richard Levett, disputed the right of the said Martha Bagot so to do.

The bill prayed an account of all monies received by the said W. Bagot, E. A. Bagot, R. Levett, and G. L. Baker and J. Phillimore, as well in respect of the rents, issues, and profits of the said settled estates, as of the timber felled thereon, and of the application of such monies, and that the said G. L. Baker and T. H. Mortimer might be ordered to pay to Martha Bagot, for her separate use, the said balance of 869*l.* 16*s.* 9*d.*, and that the said Martha Bagot might be placed in the receipt of the rents, issues, and profits of the said settled estates, so limited to her separate use by the said articles, and that the four trustees of her settlement, and William Bagot, might be restrained from receiving the rents and profits of the said settled estates, and that

the said Martha Bagot might be at liberty to appoint her own agent to receive the same for her separate use, and that a receiver might be appointed, with the usual directions.

On the 17th of December 1838, the four trustees and William Bagot, by an order of the Court, made on the motion of the plaintiffs, were restrained from receiving the rents of the settled estates, and G. L. Baker was appointed to receive the rents, as well those in arrear as those thereafter to accrue due, and without salary; and the same were directed to be applied to the separate use of Martha Bagot.

E. A. Bagot and R. Levett, by their answer, stated, that as surviving trustees of the settlement, they, in December 1836, were requested by Martha Bagot to come up to town, to assist her in arranging the affairs of herself and her husband, and liquidating their debts, without (if possible) having recourse to the sale of any property; that accordingly, certain proposals with that view were made, and afterwards embodied in the memorandum of the 16th of December 1836, mentioned in the bill, and that William Bagot was formally appointed and acted as the manager and receiver of the rents of the settled estates; that the sum of 869*l.* 16*s.* 9*d.* was the balance in Messrs. Drummonds' bank, of the produce arising from the sale of the timber felled on the settled estates, but that the same had, in pursuance of the arrangements before mentioned, and with the full consent and concurrence of Martha Bagot, been appropriated to the payment and reduction of the debts of William Bagot and Martha Bagot; and they submitted, that the sum of 869*l.* 16*s.* 9*d.* ought not to be paid over to Martha Bagot; and that in case the same should not be applicable to the payment of such debts, they were advised that William Bagot was entitled thereto, as the first tenant for life, without impeachment of waste, under the articles of settlement.

The defendants admitted, that notice of the revocation in writing of the memorandum of December 1836, had been communicated to them by means of a letter, addressed by G. L. Baker to E. A. Bagot in December 1838, and that they had

always been ready to act with the other trustees, in appointing a manager or receiver, provided such person was not a trustee of the settled estates; that it was for the benefit of the said Martha Bagot and William Bagot, that the settled estates should remain under the joint controul of all the trustees; that G. L. Baker being a solicitor by profession, was not a proper person to manage landed property, and must (if appointed) have employed an agent under him, with a salary, at some expense, to look after the affairs connected with the management of the settled estates.

The answer of William Bagot was similar in effect to the answer of E. A. Bagot and Richard Levett.

The other trustees, Baker and Phillimore, were willing to comply with the requisitions of the plaintiff, Martha Bagot, and to act according to the directions of the Court. The sum of 869*l.* 16*s.* 9*d.* had been paid into court, and laid out in the sum of 942*l.* 18*s.* 3*d.* 3*l.* per cent. consols.

The different documents, letters, &c. referred to in the bill and answers, were made the subject of admission between the parties, and the cause having come on to be heard before the Vice Chancellor, his Honour, on the 8th of May 1840, decreed the sum of 942*l.* 18*s.* 3*d.*, 3*l.* per cent. consols, to be sold, and the produce thereof paid to the plaintiff Martha Bagot, for her separate use, and on her sole receipt; and it was ordered, that the receiver G. L. Baker be continued, but without salary; and the costs of all parties were ordered to be taxed, except the costs of W. Bagot, E. A. Bagot, and Richard Levett; and the plaintiff Sir W. Pilkington, as the next friend of Martha Bagot, was directed to pay such costs when taxed; and the amount which should be so paid by Sir W. Pilkington, together with his own and the plaintiff Martha Bagot's costs, were ordered to be repaid to Sir W. Pilkington, by the defendants W. Bagot, E. A. Bagot, and Richard Levett, and any of the parties were to be at liberty to apply.

From that decree W. Bagot, E. A. Bagot, and Richard Levett, presented separate petitions of appeal, which now came on to be heard before his Lordship.

Mr. G. Richards and *Mr. Walpole*, for the appellants, *E. A. Bagot* and *Richard Levett*.

Mr. Wigram, for the appellant *W. Bagot*.

Mr. K. Bruce and *Mr. W. L. C. Keene*, for *Martha Bagot*.

Mr. Jacob and *Mr. Kenyon Parker*, for the other trustees, *Dr. Phillimore* and *W. L. Baker*.

On behalf of *Mrs. Bagot*, the revocation in writing of the 16th of December 1837, and numerous letters which had been written by or on behalf of the different parties to each other, but more particularly the correspondence between *W. Bagot* and *G. L. Baker*, the effect whereof is stated in the judgment, were relied on; and it was contended, that the proceedings on the part of *W. Bagot*, and *E. A. Bagot*, and *Richard Levett*, shewed that their object was to place the settled property under the husband's controul; that there was no consideration shewn on the part of *W. Bagot*, in respect of what had been already done by *M. Bagot*; that there was no pretence for calling the debts provided for, the debts of *M. Bagot*; that the conduct of *E. A. Bagot* and *Richard Levett* in November 1838, in refusing permission to *M. Bagot*, who was without income, to receive a small portion of the sum of 869*l.* 16*s.* 9*d.*, and the direction to the tenants not to pay their rents, except on production to them of the trustees' receipts in writing, was oppressive; that out of the timber, amounting altogether to nearly 4,000*l.*, the sum of 2,800*l.* was applied in satisfaction of the debts of *W. Bagot*; that no appeal had been presented against the order of the Vice Chancellor, for the appointment of a receiver or payment of the balance into court—*Milnes v. Busk* (1), and *Martin v. Mitchell* (2).

The trustees *Baker* and *Phillimore*, by their counsel, expressed their concurrence in the decree made in the Court below, and submitted to act as the Court should direct.

On behalf of *W. Bagot*, it was said, that everybody except the defendant *G. L. Baker*, approved of the money being

applied in satisfaction of the debts of *W. Bagot*; that the question simply was, whether the sum of 869*l.* 16*s.* 9*d.* ought to be paid to *M. Bagot*, or in payment of her debts; that *W. Bagot* had a right to say to *M. Bagot*, as the settlement said, "You have no right to displace the trustees;" that *W. Bagot* was allowed to receive the rents until December 1837, and to incur expenses of considerable amount on behalf of himself and *M. Bagot*, and in respect of *M. Bagot's* illness and change of residence, notwithstanding the appointment of the receiver had been previously revoked by *M. Bagot*, but which revocation was not made known to *W. Bagot* until December 1837—*Fortescue v. Barnett* (3).

On behalf of *E. A. Bagot* and *Richard Levett*, it was contended, that the trustees named in the articles of settlement, for the purpose of preserving contingent remainders and raising portions, ought not to have been made parties to the suit, and that therefore the decree was erroneous in directing *E. A. Bagot* and *Richard Levett* to pay those parties their costs of the suit; that the receiver was appointed by the Court below, because the four trustees could not agree amongst themselves; that it was not a matter of course to let an equitable tenant for life into possession of the settled estates; that the costs of the trustees ought to have been directed to have been paid out of the fund in court, and that no case of oppression had been proved against the trustees, *E. A. Bagot* and *Richard Levett*; nor was any statement or charge of oppression on their part contained in the bill.

THE LORD CHANCELLOR.—In this case the plaintiff *Mrs. Bagot* was, previously to her marriage with the defendant *W. Bagot*, entitled to considerable property, and amongst others to the estates from which the timber was cut, which has produced the sum of 942*l.* 18*s.* 3*d.*, 3*l.* per cent. consolidated annuities, mentioned in the decree. By the settlement on her marriage, those estates were covenanted to be settled,

(1) 2 Ves. jun. 488.

(2) 3 Jac. & Walk. 413.

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(3) 3 Myl. & K. 36; s. c. 3 Law J. Rep. (N.S.) Chanc. 106.

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subject to the life estate of her father, who is long since dead, to the use of four trustees, (of whom the defendants Egerton Arden Bagot and Richard Levett are two,) and the settlement is for a term of ninety-nine years, if the husband and wife should so long live, without impeachment of waste, on trust to receive the rents, issues, and profits, and after discharging the outgoings, to pay and apply the residue to and amongst such person or persons, and for such uses, intents, and purposes as the plaintiff, the wife, should alone, and from time to time, and without her husband, notwithstanding her coverture, and as if she were sole and unmarried, (but not by way of anticipation), by any drafts, notes, orders, or writings signed by her own proper hand, direct and appoint; and in default of such appointment, or subject thereto, upon trust to pay such surplus rents, issues, and profits to the proper use of the wife for her own sole and separate use, and exclusive of her husband, who was not to intermeddle therewith, nor were the same or any part thereof to be subject or liable to his debts, engagements, powers, disposal, or controul; and the receipts of herself, and her appointees, were to be a sufficient discharge to the trustees. I advert to the terms of the trust deed, not because there is any peculiarity in them, for they are much in the usual form, but for the purpose of shewing that the trustees did not require any knowledge of the principles of this Court applicable to the subject: they had only to follow the directions so distinctly given, and to perform the duty in the terms there introduced. The trustees could not but know the object of their appointment was to protect the wife against the marital rights, debts, and obligations of the husband, and their duty was to secure to her the full enjoyment of the property, according to the provisions of the settlement, as if she had been in fact unmarried. It will be now seen how they performed their duty.

In 1836 the trustees appointed the husband receiver of the estates, and the wife signed a paper, dated the 16th of December 1836, authorizing the trustees to pay 200*l.* per annum only of the rents to herself, and the remainder to her husband.

The defendants, E. A. Bagot and Richard Levett, the then trustees, admit they presented this document to the plaintiff for her signature. Whether this application of the income of the wife's separate estate was proper or not, must depend on circumstances existing at the time; in many cases there could be no objection to it. The question is not whether the application of the rents was proper, but whether it was right to procure the wife to sign a paper, which purported to defeat the most important provisions of her settlement. The object of that settlement was to leave her the liberty, on this particular payment being made, to direct the application of it; the object of this document was to bind her for the future to the payment of all but 200*l.* per annum to the husband. It is true, the defendant Levett says, he informed her at the time she would possess the power of revoking it when she pleased; but if it was not intended to have some binding power on her, why was she asked to sign it? And it appears the defendant, E. A. Bagot, founded his resistance to the rights of the wife, whom he was bound to protect, on her signature to this paper. Soon after the wife, being better advised, signed the paper dated the 15th of April 1837, by which she revoked the former paper of the 16th of December 1836, and directed the payment of the rents to her separate use, according to the provisions of the settlement; there is no doubt, therefore, of the time at which this act of the wife was communicated to the trustees, but they admit it was made known to them in the December following; and, I presume, this is what Mr. E. A. Bagot calls an official communication, for in a letter of his, of the 18th of December 1837, he says, "Mrs. Bagot's revocation has now been officially laid before them;" but that they never objected to the application of the rents, as directed by the paper of December 1836, and endeavoured, by all means in their power, to keep her bound by the terms of that paper, is proved by the correspondence, for Mr. E. A. Bagot, in a letter of the 23rd of April 1837, insists on the performance of the terms of that paper. Instead of receiving protection from the trustees, the wife was under the

necessity, in January 1838, of giving notice to Mr. Fowler, the manager, not to pay the rents to the husband; and on Mr. Baker, one of the trustees, intimating his intention of himself receiving the rents, a notice was served on the tenants and manager, in the name of the husband, not to pay any rents except to such person as was authorized by all the four trustees to receive them. The obvious and necessary result was, that the wife was deprived of the enjoyment of her property, and this Court interposed by the appointment of Mr. Baker as receiver.

The sum of 942*l.* 18*s.* 3*d.*, 3*l.* per cents. mentioned in the decree, is the investment of 869*l.* 16*s.*, mentioned in the bill, and is the ultimate balance of a large sum of nearly 4,000*l.*, the produce of timber cut on the wife's estate after her father's death, and under the authority of the trust for ninety-nine years, without impeachment of waste.

No question being raised, as to whether the timber was properly cut, the produce of it was payable to the wife under the settlement for her separate use, but the husband claims it on the ground, that if he survives his wife he will be tenant for life without impeachment of waste; and this is gravely set up by the trustees as a reason for withholding this timber money from the wife. They also insist, that the wife has parted with her interest by agreeing that the timber should be cut, and the proceeds applied in payment of the husband's debts, and the timber was accordingly sold on the 28th of February 1837, and afterwards cut down. It is not material to inquire what proof there is (if any) of such arrangement, it being clear, that if it were made as it is stated, it is not binding on her, and there is no evidence of any direction binding on her as to the application of the timber money. The paper, dated the 5th of April 1837, merely directed the payment of the timber money into Messrs. Drummonds', subject to the directions of the trustees; and the alleged agreement of April 1837 is wholly inoperative as an appropriation of her separate property, and yet this sum the defendants, the trustees, have throughout taken from her, and by their answer insist she is not

entitled to. They have throughout endeavoured to aid the husband in defeating the wife's enjoyment of her separate estate, instead of protecting her in the enjoyment of it, which it was their duty to do, and this is not a case in which adverse claims of the husband and wife have prevented them from performing their duty as trustees. There was nothing to make a suit necessary if they had specifically performed the duty pointed out to them in the settlement; it has become necessary, from the unfounded claims of the husband, improperly recognized and supported by the trustees. I think, therefore, the Vice Chancellor's decree has most properly directed the three to pay the costs of the suit.

The decree is also, I think, correct in continuing the receiver; no motion was ever made to discharge Mr. Baker from that office, and it is clear there must either be a new appointment of trustees, or the receiver must be continued; and without saying whether, after what has passed, the Court will leave the wife in the hands of the two appealing trustees, it is manifest the property cannot be managed by the four.

It is then objected, that the defendant; the husband, and two of the trustees were made to pay the costs of those entitled in remainder, and who are not necessary parties to the suit, and I agree there ought not to have been any necessity for making them parties; these defendants, however, cannot make the objection, because the claim they set up, on the part of the husband, as being entitled to a tenancy for life in the timber money, raises a question, however untenable, in which the other persons entitled in remainder are interested. I think the plaintiff has been very temperate in the decree she has asked of the Court; and as she has asked no more, it is not important to consider what she might have been entitled to, if she had enforced her rights to the full extent.

The appeal of the trustees is merely for costs; on the merits I do not think there is any foundation for either of the appeals, and therefore dismiss both, with costs.

L.C.
 Nov. 5, 1840; }
 Jan. 20, 1841. } BARNARD V. PUMFRETT.

*Will—Construction—Legacy—Executor
 —Admission of Assets—Personal Liability.*

A, by his will, bequeathed the sum of 500l. to each of the children of his sister M, each of the sons to be entitled to his share, on his arriving at the age of twenty-five years, and the daughter on her arriving at twenty-one, or on the day of marriage, to be paid to them by A's executor (his son) thereafter named, immediately on such child attaining the said age or day of marriage respectively. A, by the same will, gave an annuity of 20l. to his sister B, for her life, to be paid by his executor, and then bequeathed all his personal estate to his executor, subject to the aforesaid payments. The executor, shortly after A's death, by letters, acknowledged the right of the children of C to the legacies, and promised to pay them when due, and afterwards paid a sum of 100l. to one of the legatees, and also made payments on account of the annuity of 20l. to the annuitant. The executor, in his answer filed to the bill of the legatees, laid claim to a considerable part of the testator's personal estate, as the subject of gift to him by A, previously to his death, and also insisted that, according to the true construction of the will, the legatees were entitled to one sum only, of 500l. amongst them, and not to distinct legacies of 500l. each; the payments having been made and letters written by him (as he alleged) inadvertently, and under a misapprehension of the real facts:—Held, that the defendant, the executor, not having satisfactorily proved the alleged fact of the gift to him, of parts of A's personal estate previously to A's death, and having peculiar and intimate knowledge of the estate and property of A, who was his father, and with whom he had been in partnership shortly previous to his death, and not having within a reasonable time recalled his promise to pay the legacies, was personally liable to pay, not one sum of 500l., but the several legacies of 500l. each.

The Court will relieve an executor from an admission of his liability to pay legacies if made incautiously and by mistake, if he

recall the same within a reasonable time after discovery of the mistake.

Semble—That payment of interest upon a legacy, or a declaration that a legacy is ready for the legatee at twenty-one, will be held to be an admission of assets.

Semble—That a widow, the executrix of her husband, having refused to pay legacies given by her husband's will, and having stated as a reason for such refusal that the personal estate was out on mortgage, the same was a sufficient admission of assets.

Semble, also, that forbearance of a present demand on payment of interest, is a sufficient consideration to make an executor personally liable on a contract.

The bill in this case was filed in May 1838, by five several legatees, against the executor, for the payment of legacies of 500l. each, bequeathed by the will of John Pumfrett, which was as follows:—"I give and bequeath the sum of 500l. to each of the children of my sister, Mary, the wife of Philip Barnard, each of the sons to be entitled to their respective shares on his arriving at the age of twenty-five years, and the daughter on her arriving at the age of twenty-one years, or on the day of marriage, to be paid to them by my executor hereinafter named, immediately on such child attaining the said age or day of marriage respectively. I give and bequeath unto my sister Mary Barnard an annuity of 20l. for her life. I give and bequeath to my sister Ann Edis an annuity of 20l. for her life, and I direct the annuities of 20l. each shall be paid by my executor." The testator then proceeded to bequeath all his personal estate, of every description, subject to the payment of his debts, funeral and testamentary expenses, and the said annuities and legacies therebefore bequeathed, unto his son George Betts Pumfrett, and he made him the devisee of his real estates.

The testator died in May 1836, and his will was proved by his son on the 6th of August 1836. The testator, at the time of his death, was possessed of considerable personal estate, and seised also of some real estates. The plaintiffs were the five children of the testator's sister, living at the death of the testator, two of whom only had

attained the age of twenty-five years: the annuitant, Ann Edis, was living at the time of filing the bill, and had been paid her annuity by the defendant G. B. Pumfrett since the testator's death; and, in the month of February 1838, the defendant, G. B. Pumfrett, paid to P. L. Barnard, one of the plaintiffs, 99*l*. 19*s*. on account of his legacy of 500*l*. The defendant, on the 29th of May 1836, wrote and sent to the plaintiff, P. L. Barnard, a letter of that date, which was as follows:—"My dear P.—By the last will of my father I perceive you are entitled to a legacy of 500*l*., to be paid to you on your attaining the age of twenty-five years, the same legacy of 500*l*. to each of your brothers on attaining the same age, and a similar sum to your sister on her arriving at twenty-one. The above legacies, I assure you, shall be most cheerfully paid to you all, in just compliance with your late dear uncle's request, and I only hope that the best success may attend you whenever you see an opportunity to employ it; there is, however, one thing I must beg to be allowed to caution you against—a hasty or premature embarking into speculative theories—500*l*. is a pretty little round sum that may very soon be melted, without consideration," &c. On the 16th of June 1837, the defendant wrote and sent another letter to the plaintiff P. L. Barnard, and which was of that date, and was as follows:—"I am in hopes that in the course of a few days I shall be enabled to place your money out on mortgage; the party, however, has not yet made up his mind if he mortgages or sells; should he do the latter, the money will be useful to me, so that you need be under no apprehension respecting interest. I hope in the course of a short time seeing you again. Yours truly, G. B. P." The bill, besides stating the facts already mentioned, charged that the whole of the mortgage and other specialty and simple contract debts of the testator were at his death, and were at that time, as between the plaintiffs and the defendant, payable out of the real estate of the testator; and that, if necessary, the real and personal estate and assets of the testator ought to be marshalled, in order to give effect to the rights and interests of the plaintiffs; that the testator and the defendant were in

partnership together, as brewers, from November 1821 until October 1833, and made great profits as such co-partners; that thenceforward the testator let the brewery premises to the defendant at a rent of 160*l*. a year; that, on the testator's death, there was due from the defendant to the testator's estate a considerable sum of money in respect of arrears of rent for the brewery premises, and for loans made by the testator to the defendant at different times during the testator's life; that the defendant had received the debts due to the firm, and had never accounted for the same to the said testator during his lifetime, or to his estate since his decease; and the bill prayed, at considerable length, that it might be declared that the defendant was personally liable to pay and secure the several legacies of 500*l*. each, with interest; that the plaintiffs might be declared to have a lien, in respect of their legacies, upon the testator's personal estate; and also upon the testator's real estates, to the extent of such part of the personal estate, and the value thereof, as should appear to have been paid in the satisfaction of the testator's debts; and that accounts might be taken of the personal estate of the testator received by the defendant, and the profits acquired from the business since the determination of the partnership in 1833; and that the real and personal estates of the testator might be duly marshalled.

The defendant, by his answer (amongst other things), stated, that on the determination of the partnership between himself and the testator in October 1833, the latter let the premises, on which the partnership business was carried on, together with the dwelling-house in which the testator and the defendant resided, to the defendant, at a rent of 160*l*., and gave to the defendant the whole of the plant not connected with the freehold of the premises, including the horses, carts, waggons, drays, and other things which had been used in the partnership business; and on the 12th of the same month of October, gave defendant a sum of 300*l*., and on the 30th of the same October, a further sum of 300*l*., to enable the defendant to carry on the said business, but delivered over the remaining stock of the said partnership to the defendant on a

valuation fixed between them, the amounts whereof, making in the whole 255*l.* 15*s.* 6*d.*, were, by the testator, charged in an account between the testator and the defendant, and afterwards paid and satisfied by the defendant to the said testator, who reserved to himself all the debts due to the partnership, amounting to 1,589*l.* 17*s.* 6*d.*, as his own absolute property, whereof the testator personally collected 83*l.* 19*s.* 1*d.*, and the defendant received and accounted for, unto the said testator, the sum of 1,440*l.* 8*s.* 9*d.*, making together the sum of 1,524*l.* 2*s.* 10*d.*, and whereof the residue remaining due, to the amount of 65*l.* 14*s.* 8*d.*, was, at the time of the death of the said testator, bad, and barred by the statutes made for the limitation of actions. The defendant further stated, that in or about February 1838, but in ignorance of the liability of the personal estate of the testator to answer the mortgage debts of the testator, and supposing that the testator's devised real estate was liable to answer the legacies, he paid to the plaintiff, P. L. Barnard, the sum of 99*l.* 19*s.*, as the defendant, in such ignorance, considered on account and in part of the last-named plaintiff's alleged legacy of 500*l.*; that the sum of 533*l.* 0*s.* 10*d.* was the total balance in his hands arising from the testator's personal estate, which the defendant claimed to retain towards payment of the testator's specialty debts, for which the defendant was bound as his heir-at-law. The defendant denied, by his answer, that he had ever admitted assets sufficient to pay the legacies given by the will, although the defendant, erroneously believing that the whole estate of the testator was liable to the payment of the said legacies until otherwise advised, had so written and spoken of the estate of the testator, as very probably to induce others to believe that there was estate of the testator sufficient and applicable to the payment and satisfaction of such legacies; and the defendant stated, that the whole of the testator's personal estate was not sufficient for the payment of his debts and funeral and testamentary expenses; and he submitted that none of the plaintiffs were entitled to legacies of 500*l.* each, with interest; and stated his belief, that the testator intended only to give the plaintiffs one sum

of 500*l.* between them in equal shares; and that the words "each of," were introduced into the will between the words "bequeath the sum of 500*l.* to," and the words, "the children of my sister, the wife of P. Barnard," by mistake.

The parties entered into admissions in writing, by which entries of sums contained in certain account books kept by the defendant, were acknowledged to be in his handwriting; and a long correspondence between the solicitors of the respective parties, which took place principally in and subsequently to March 1838, (including the letters of the 29th of May 1836, and the 6th of June 1837,) was also the subject of admission; the defendant examined two persons of the name of Allen and Warsop as witnesses, who proved the determination of the partnership between the defendant and his father in October 1833, as alleged in the answer, and the gifts by the father to the defendant, of large sums of money to enable him to carry on the business.

After the cause had been heard by the Master of the Rolls, his Lordship, on the 12th of June 1840, decided that each of the plaintiffs was entitled to a legacy of 500*l.*, according to the intention of the testator, as it was clearly expressed in the will: and that as the executor had expressly undertaken to pay those legacies, and had actually paid a part of one of them, and had also paid the annuity of 20*l.* per annum—while from his particular position he must have been well acquainted with the state and amount of his father's property—he must be considered to have rendered himself personally liable to the legatees, and that he must be decreed to pay them their respective legacies in full. The defendant appealed from the decree of the Master of the Rolls.

Mr. Willcock appeared in support of the appeal.

Mr. G. Richards and *Mr. Billon*, contra.

For the appellant it was contended, that the real intention of the testator was, to give one legacy only of 500*l.* amongst all the plaintiffs, and not to each a distinct legacy of 500*l.*; that the assent by the defendant of the right of each of the plaintiffs to

a distinct legacy of 500*l.* was a mistake, and that he ought not to be personally bound by it, but to be relieved from such assent on his subsequent discovery of the mistake on the investigation of the accounts; that the testator's real estate was not liable to the payment of the legacies (supposing the plaintiffs entitled to distinct legacies of 500*l.* each,) in case the Court should be of opinion that the defendant was not personally liable to the payment of the legacies.

For the respondents, the plaintiffs, it was contended, that the testator's real estate was liable to the payment of the plaintiffs' legacies, the executor taking it on the condition of paying the legacies; that the defendant, by the letters written by him of the 29th of May 1836, and 16th of June 1837, and by payment of the annuity of 20*l.* to A. Edis, had admitted assets sufficient to pay the plaintiffs' legacies, and was personally liable to pay the same; that if an executor paid part of one legacy, the payment bound him as to the other legacies bequeathed by the will.

Amongst the authorities cited in the course of the arguments, were the following:—

Bradly v. Heath, 3 Sim. 543.

Cook v. Martyn, 2 Atk. 2.

Parker v. Fearnley, 2 Sim. & Stu. 592.

Finch v. Hattersley, 3 Russ. 345, n.

The LORD CHANCELLOR.—If all which the defendant has stated in his answer had been proved, and if the construction of the will contended for by him, were to be assumed to be the true construction, this would be a case of much hardship and some difficulty; but as no evidence is adduced as to any of the important circumstances stated (and no importance can be attached to the evidence of David Allen and John Warsop,) I do not think that such a character can be attributed to it. As to the construction of the will, whatever speculation may have been indulged in as to the real intention of the testator, it is quite clear that the terms used are such as to denote a gift of 500*l.* to each of the children of his sister Mary, and the ground on which my judgment is founded, makes it

unnecessary for me to express any opinion on the other points suggested, as to which the defendant says, that he was mistaken. If he was not mistaken, or if what he now claims as gifts from his father cannot be proved by him to have been so, (and of the fact he has not given any evidence that can be relied on,) then the decree of the Master of the Rolls is as consistent with the real justice of the case, as I believe it to be with the principles of law; and in that case the defendant will have nothing to regret in the course which he followed up to March 1838, when he seems for the first time to have entertained the idea of disputing the title of the plaintiffs. The testator died in May 1836, and the defendant, his son, was the residuary legatee and devisee of all his real and personal estate; and not only from the situation of the son, but as partner with his father, he must be supposed to be well acquainted with the particulars of his property; he must have been aware whether those portions of the property which he now claims as gifts from his father, were so in fact, or constituted part of his property, applicable to the payment of his debts and legacies. With all these means of information he finds upon the will, legacies given of 500*l.* each to the nephews and nieces of his father, and an annuity of 20*l.* per annum to their mother, his father's sister, who is since dead, and 20*l.* to another sister, Mrs. Edis. The defendant, by a letter, dated the 29th of May 1836, written by him to the plaintiff Philip, informs him that he is entitled to the legacy of 500*l.* to be paid to him on his attaining the age of twenty-five, and the same legacy to each of his brothers on their attaining the same age, and a similar sum to his sister on her attaining twenty-one, and then proceeds, "The above legacies, I assure you, my dear Philip, shall be most cheerfully paid to you all, in just compliance with your late dear uncle's request.—I shall, as soon as the legal time arrives for payment, give you notice, so that you may please yourself in what way you would like to receive it." This letter was written very shortly after the testator's death, before the will was proved. Under ordinary circumstances, therefore, there might not be just grounds

for binding the writer to the terms used in it.

The case, however, is peculiar, from the knowledge the defendant must have had of the property; and after he proved the will, and up to March 1838, he not only did not say or do anything recalling the representation and promise contained in that letter, but continued to act and to express himself in strict conformity with what he had so written. I do not find it proved at what time the plaintiff Philip attained the age of twenty-five, but it must, I presume, have been before the 16th of June 1837, for, by a letter of that date, the defendant considers all the legacies of 500*l.* as payable; for he says, "I am in hopes that in the course of a few days I shall be able to place your money out on mortgage. The party, however, has not yet made up his mind whether he will mortgage or sell; should he do the latter, the money will be useful to us, so that you may be under no apprehension respecting the interest." The money was not placed out on mortgage; the case, therefore, arose provided for in this letter, viz. the defendant borrowing and retaining it himself, and becoming therefore liable by his own undertaking to pay interest upon it. And so it has remained until the present time, except that in the February following (1838) the defendant paid 99*l.* 19*s.*, in part payment of this legacy. The defendant also paid the annuity of Mrs. Edis from the death of the testator.

These letters and this dealing with the legatees, was an assent to the legacies, and an admission of assets, and an admission to one legatee is an admission to all. It has been held in equity, that an executor by taking a grant of a term from a person to whom it was bequeathed (1), or an executor saying, "I intend him to have his legacy according to the devise" (2), or that "the legacy is ready for him whenever he will call for it" (3), constitutes a good assent to a legacy. In this case, all the circumstances which separately occur in those cases are found combined. There is the

assent to the legacy, the promise to pay, and the borrowing of the sum by the executor from the legatee.

In the cases in which it has been held that a representative has become personally liable for a legacy, the liability has been put on different grounds. In some cases, that which had taken place amounted to an admission of assets; in others, the representative had sufficient assets, and had undertaken personally to pay. In the case of *The Corporation of the Clergymen's Sons v. Swainson* (4), payment of the interest upon a legacy was held to be an admission; and in *Campbell v. Radnor* (5), a widow, the executrix of her husband, having refused to pay legacies given by her husband's will, and having stated as a reason for such refusal, that his personal estate was out on mortgage, was held to amount to a sufficient admission of assets to pay the husband's legacies. It does not appear in *Horsley v. Chaloner* (6), what had been done by the executor; but the Master of the Rolls says, "he was personally liable on a declaration, that a legacy was ready for the legatee at twenty-one." In *Hawkes v. Saunders* (7), the admission of assets was held to be a sufficient consideration to support a promise to pay a legacy. And in *Childs v. Monins* (8), forbearance of a present demand on payment of interest, was held to be a sufficient consideration to make an executor personally liable on a contract.

In this case, therefore, all the circumstances concur which have been held necessary to make an executor personally liable; and no attempt is made to support by evidence, any case upon which the Court has thought it just to relieve executors from an incautious admission of liability. I am, therefore, of opinion, that the decree of the Master of the Rolls is well founded, and that the appeal must be dismissed with costs.

(4) 1 Ves. sen. 75.

(5) 1 Bro. C.C. 271.

(6) 2 Ves. sen. 83.

(7) 1 Cowp. 289.

(8) 2 Brod. & Bing. 460.

(1) Wentw. Exors. 214.

(2) Shep. Touch. 436.

(3) *Hawkes v. Saunders*, 1 Cowp. 289.

L.C. }
Jan. 14, 15. } GREENLAW v. KING.

Annuity—Clergy—Trustee, Purchase by—Statute.

A purchase of an annuity by a party standing in a fiduciary situation, set aside.

The rule of the Court, relative to purchases made by parties standing in a fiduciary situation, is not confined to particular classes of persons, as trustees, solicitors, and guardians, but affects all persons coming within the principle of the rule; and no persons will be permitted to purchase interests when they have duties to discharge which are inconsistent with their character of purchasers.

A party who is intrusted to sell and manage for others, undertakes, in the moment in which he becomes a trustee, not to manage for the benefit and advantage of himself.

For the facts of this case, the authorities cited by counsel, on the hearing before the Master of the Rolls, and his Lordship's judgment, vide 9 *Law J. Rep.* (N.S.) Chanc. 377. From the decision of his Lordship in favour of the plaintiff, the defendant King appealed.

Mr. Wigram and Mr. R. W. E. Forster, for the respondents.

Mr. G. Richards and Mr. Heberden, for the appellants.

Jan. 15.—The LORD CHANCELLOR, on this day, delivered his judgment on the appeal.—I have looked through the cases referred to in the course of the argument, and I find no reason to alter the opinion I then formed. The Bishop of Rochester was not in a situation that enabled him to deal with the property in question as he has done; and the Master of the Rolls very properly expressed an opinion that there was nothing in the transaction that could at all reflect on the bishop's conduct, for the bishop only intervened in the matter when the advance of the money required could not be obtained from other sources, on the same beneficial terms as were offered by him. The bishop was not, at the time of the transaction, aware, nor had he his attention sufficiently drawn to the rules of this court relative to purchases made by persons holding confidential situ-

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ations. The observations I have to make are not concerning the intention of the parties connected with the transaction, but on the rule of this court in cases like the one before me. Some of the authorities referred to in the course of the arguments, might lead persons to suspect that there was an absolute rule of the court applicable only to particular classes of persons, such as solicitors, guardians, and trustees, in the ordinary sense of that word, whereas the principle of the rule lies much deeper; and the rule has reference to and affects all persons coming within its principle, which is, that no persons can be allowed to purchase interests where they have duties to discharge, which are inconsistent with their character of purchasers. It is not sufficient to say, a particular person or class of persons is not within the rule: that was strongly exemplified in *Ex parte Hughes* (1), which, in its circumstances, is the nearest case to the present that I can find; and it was there held, by Lord Eldon, that the creditor who had been previously consulted only as to the mode of sale of a bankrupt's property, but had not acted in the sale, could not be allowed to be a purchaser under it. The cases of *Ex parte Bennet* (2) and *Grover v. Hugell* (3) clearly establish the principle which governs cases of this nature; the question not being, whether a case is to be found in the books exactly similar to the present, but whether the transaction before me comes within the principle. Here a sum of money, which was to be raised by way of annuity, was required to be laid out in improvements, and in repairing and beautifying the new rectory-house and offices, &c. mentioned, but the amount was not to exceed the sum of 2,000*l.*; and it would have been improper, and perhaps injurious to a successor in the living, to have left to the then incumbent alone the power and discretion of charging the same, he having only a limited interest therein. In this case, therefore, as in all others of a like nature, another authority was interposed, and the Bishop of Rochester, who was the patron of the living, was appointed by the act of parliament to exercise a dis-

(1) 6 Ves. 617.

(2) Ibid. 116.

(3) 3 Russ. 428.

cretion in raising the amount required for the purposes contemplated by the act.—[His Lordship here read that part of the act of the 52 Geo. 3, which enabled the rector of the parish of Woolwich, for the time being, with the consent of the Bishop of Rochester, to borrow a sum by way of annuity, not exceeding 2,000*l.*, for the purposes mentioned in the act.]—It is quite immaterial, whether the bishop was appointed only to ascertain the sum proper to be raised, or the terms on which the annuity was to be granted. The bishop intervenes, as he was required to do by the act, and as was necessary, and the annuity is granted to another person on behalf of the bishop. I say nothing more on that part of the case, but that the bishop was selected to take care of the interest of those who were not and could not be present in the transaction, viz. of those who might thereafter be appointed rectors of the living. *Howard v. Ducane* (4) was a very different case to the one before me; there the tenant for life, the purchaser, had only to protect himself, and not any absent party, the trustees being present to protect the inheritance and those to come afterwards. Generally, the trustees are not the active parties in selling estates, but the tenant for life. It is singular, but, as the law now stands, a tenant for life of an estate cannot purchase it, under a sale directed by this Court; but he may be the purchaser where the sale is not made under the order of this Court. According to the authorities, it is clear the bishop could not become a purchaser of the annuity in the present case. Before I dismiss that part of the case which relates to the purchase made by the bishop, I will refer to *Ex parte Lacey* (5), where Lord Eldon explains the principle, and says, "A trustee who is intrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself."

The only question that remains for my consideration is, whether, after so great a lapse of time, the Court ought to set aside the annuity. The present incumbent of the living has nothing to do with the time

that has elapsed. The late rector could not by his act bind his successor, who, when he was presented to the living, found it deeply encumbered, and within one year afterwards asserted his right. Suppose the former incumbent and the bishop had colluded, and the incumbent had lived thirty years afterwards, could his successor be precluded by the lapse of time from asserting his right? It is impossible, under the circumstances of this case, that time can run against the relief prayed by the bill. It is then said, that the result of all this will be, that the plaintiff will gain a benefit. No doubt he will, but such a result is common to all cases where transactions are entered into that cannot be supported. It is a wholesome result of the principle I am speaking of, that a *cestui que trust* obtains the benefit of a breach of trust committed by his trustee, and is sometimes better off than he would been if the breach of trust had not been committed. If a trustee makes a bargain, which cannot be maintained, he is not permitted to say the bargain cannot be supported, whether it turn out beneficial to him or otherwise. He must take the consequence, the one way or the other, of the infirmity of the original transaction. Here, incidentally and by accident, the present incumbent receives the income of the living, freed from the annuity, in the same way that a *cestui que trust* gains the benefit of a breach of trust committed by his trustee; and however prejudicial it may be to the trustee, and in favour of the *cestui que trust*, the consequences must follow; but the Court will not set aside an annuity, or any other transaction, without doing justice between the parties. This Court will see justice done to a defendant in the case of an annuity which has been granted, and is void at law; and if the proceedings in the case before me had been taken before the principal money advanced and interest thereon had been wholly paid, this Court would have seen that the defendant was paid what remained due to him, in respect of the principal sum and interest thereon; but it is conceded by the defendant, that the sums which have been paid by way of annuity, exceed in amount the principal money and interest thereon. It is then said, that the late rector has had the benefit of all

(4) *Turn. & Russ.* 81; *a. c.* 1 *Law J. Rep.* Chanc. 85.

(5) 6 *Ves.* 625.

the improvements: be it so, but he has only paid what he contracted to pay. It is the bishop who received less, and not the late rector, who received more than he contracted for. There has not been anything urged on the part of the defendant, as a sufficient ground for interfering with the decision of the Master of the Rolls.

Appeal dismissed.

M.R.
Nov. 3, 4, 1840. } PLATT v. ROUTH.
Jan. 16, 1841. }

Will—Statute 36 Geo. 3. c. 52—Legacy Duty—Probate Duty—Power.

A testator bequeathed the residue of his personal estate, upon trust for his daughter, J. A. P., for her life; and after her decease, upon trust, for such persons (except certain parties named in the will), as J. A. P. should appoint by will; and in default of appointment, upon trust for other parties. J. A. P., by her will, appointed the trust fund in exercise of this power:—Held, that this was a general and absolute power within the meaning of the 36 Geo. 3. c. 52; and first, that a legacy duty of 1l. per cent. was payable in respect of the testator's residuary estate, bequeathed in the manner before mentioned; secondly, that no probate duty was payable upon the probate of J. A. P.'s will, in respect of her father's residuary estate, so appointed by her; and thirdly, that legacy duty was payable in respect of the bequests contained in the will of J. A. P., at the same rate as if those legacies had been payable out of her personal estate.

The manner in which this case was brought before the Court, is stated in the judgment of the Master of the Rolls.

Mr. Tinney and Mr. Teed appeared for the legatees; and

Mr. Pemberton and Mr. Romilly, for the Crown.

The following authorities were referred to—

36 Geo. 3. c. 52. ss. 7, 18.

Jenney v. Andrews, 6 Mad. 264.

Palmer v. Whitmore, 5 Sim. 178.

The Attorney General v. Hope, 1 Cr. M. & R. 530.

Vandiest v. Fynmore, 6 Sim. 570.

The Attorney General v. Staff, 2 Cr. & M. 124; s. c. 3 Law J. Rep. (n.s.) Exch. 6.

Jan. 16, 1841.—**THE MASTER OF THE ROLLS.**—In this case, a question having arisen respecting the amount of probate and legacy duty, payable upon the property bequeathed by the will of John Ramsden and Judith Ann Platt, a sum of 40,000l. 3½l. per cent. reduced annuities, was carried over to the account entitled, “the legacy and probate duty account;” and a case was submitted for the opinion of the Judges of the Court of Exchequer upon the subject, which was argued in May 1840 (1). The Judges have certified their opinion to be, first, “that on the death of Judith Ann Platt, a duty of 1l. per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof. Secondly and thirdly, that no probate duty is payable upon the probate of the will of the said Judith Ann Platt, in respect of the estate and effects of her late father, appointed by her in pursuance of the power given to her by his will; and fourthly and fifthly, that legacy duty is payable in respect of the bequest contained in the will of the said Judith Ann Platt, at the same rate at which such duty would have been payable if the bequests had been mere legacies given by her, payable out of her personal estate.”

Of that certificate complaint is made both by the Attorney General claiming the probate duty and the legacy duty for the Crown, and by Mr. Drake, who is entitled to the fund in court, subject to the payment of the duty, which ought to have been paid. Mr. Drake alleges, that no legacy duty is payable in respect of the residuary estate of John Ramsden, which by his will was given, after the death of Judith Ann Platt, to her appointment; or if any duty is payable thereon, that such duty is payable only as would have been payable, if the appointment made by Judith Ann Platt had been part of the will of John Ramsden, and if the appointees of Judith

(1) See 6 Mee. & Wels. 756; s. c. post, Exch. 105.

Ann Platt had been appointed by his will to take the residuary estate in the manner directed by the appointment. The Attorney General alleges, that probate duty is payable upon the probate of the will of Judith Ann Platt, in respect of the estate and effects appointed by her, in pursuance of the power given her by the will of John Ramsden. And in this state of things two petitions have been presented, one by the Attorney General, praying that there may be paid to the Receiver General of Stamps, not only the legacy duty, which the Judges have certified to be due, but also probate duty upon the probate of the will of Judith Ann Platt, which the Judges have certified not to be due. And the other petition is by Mr. Drake, who prays, either that the whole fund in court may be transferred and paid to him without deducting anything for probate and legacy duty, or that the sum funded may be transferred and paid to him, after deducting only such legacy duty as would have been payable if the appointees of Judith Ann Platt had been named as legatees in the will of John Ramsden.

The doubts that attend the question, and the amount of the sum in contest, have induced both parties to say, that whatever the decision may be here, the case must ultimately be brought under the consideration of the House of Lords; and I was therefore requested not to ask any further assistance from the Judges, but to make an order, upon which the parties might proceed at once to the highest Court; and with that requisition I very willingly complied.

The case is, that John Ramsden, by his will, dated the 10th of March 1825, gave his residuary personal estate to his executors and executrix, on trust to permit his daughter, Judith Ann Platt, to receive the interest thereof during her life; and after her decease (subject to certain payments,) upon trust for such person or persons, (other than and except Joseph Woodhead, and his relations, Moses Hoper, and his relations, and the relations of Mrs. Platt's late husband, and every of them,) in such parts, shares, and proportions, and in such manner, as she, whether sole or coverte, should by will appoint; and in default of appointment, upon trust for the next-of-kin

of Dyson Ramsden. And by a distinct clause in the will, the testator declared, that if Mrs. Platt should intermarry with Joseph Woodhead, or any of his relations, or should reside with or receive visits from him or them, the bequests in her favour, with the power of appointment given to her, should be thenceforth absolutely null and void.

The testator died in May 1826; the estate was realized, and the income of the residue was paid to Mrs. Platt during her life. She married George Edward Platt, and on the 27th of April 1837, she made a will in execution of the powers given to her by her father's will, and thereby gave and appointed her father's residuary estate to various persons; and amongst other sums she gave 10,000*l.* 3*l.* per cent. annuities, to the descendants of Dyson Ramsden; she died in September 1837.

Upon this occasion the questions are, first, whether Mrs. Platt or her estate is liable to pay any legacy duty, beyond that which was payable upon her life interest given to her for her own benefit. Secondly, whether any probate duty is payable on the probate of her will in respect of her father's residuary estate thereby appointed; and, thirdly, what (if any) legacy duty is payable on the sum appointed by her will.

The first and last of these questions appear to me to be attended with very considerable difficulty. The first depends upon the construction which ought to be put upon the 18th section of the statute 36 Geo. 3. c. 52. It is argued on the part of the Crown, and the opinion of the Judges of the Court of Exchequer has so declared, that the power given by the will of John Ramsden is a general and absolute power within the meaning of the act. On the other hand, it is contended, for Mr. Drake, that a power to be exercised by will, which cannot be exercised in favour of certain excepted classes of persons, and the valid exercise of which depends upon the donee abstaining from certain specified acts, cannot be deemed an absolute and general power. And then it is said, that the act, if it does not comprise the particular case, cannot be extended by construction; so that, if the particular case be not specifically described, the duty is not imposed; and it is not competent to

any Court to presume upon the intention of the legislature, and to say, that because it must have been intended, it must therefore be considered by the Court that the duty was imposed.

In this case, the residue of John Ramsden's estate was given for a limited interest to Mrs. Platt. The power of appointment was also given to her; and she was not the person to whom the property would have belonged in default of appointment. Under these circumstances, if the power of appointment is to be considered general and absolute, the case would fall within the express provisions of the act; and the question therefore comes to this, whether the power given in this case is not, or is, a general and absolute power within the true meaning of the act: and after some hesitation, and contrary to my first impression, I have come to the conclusion that it is.

Provision was made for the duties payable on legacies, which were subject to powers. If the appointees were named or described by the testator, (the donor of the power,) and the proportions only were left to be determined by the donee of the power, the appointees were charged as legatees of the testator. But if the appointees were not named or described by the testator, but left solely to the disposition or selection of the donee of the power, in that case the property, by the execution of the power, that is, the doing of the act whereby the property is disposed of, or the appointee selected, is charged as if it had been given to the donee of the power, after allowing for any duty before paid in respect thereof.

Now the limited interest first given, and the interest vested by means of the execution of the power of appointment, which disposes of the whole remaining interest, make together the whole interest in the property: and it is the entire property which, in such a case as this, is partly possessed, and, as to the rest, disposed of by the donee of the power; and considering the meaning of the words "general and absolute," in their application to such a case, I do not think that the power can be considered as otherwise than general and absolute within the meaning of the act, because it could only be executed by will, or because the donee was not permitted to execute it in favour of three families named.

A power which might be exercised in favour of anybody in the world, except the members of three families, appears to me to be, for this purpose, a general power; and as, amongst the objects of it, the power of disposition is absolute, I think the power is within the meaning of the act "a general and absolute power;" and, consequently, I am of opinion, that upon the death of Mrs. Platt, which was the time when the execution of the power by will took effect, a duty of 1*l.* per cent. became due upon the residuary estate of John Ramsden, after allowing for any duty previously paid in respect thereof. My opinion is not founded upon any notion, that the residue of Mr. Ramsden's estate had become the property of Mrs. Platt, but upon the notion of property thus circumstanced, that it is chargeable by the words of the act.

The next question is, whether the residuary estate of John Ramsden, appointed by the will of Mrs. Platt, is chargeable with the probate duty upon the probate of the will of Mrs. Platt; and I am of opinion that it is not. It was not the property of Mrs. Platt, nor could it be recovered by her executors by virtue of the probate. It would be singular that a rule of this Court, which requires the probate merely as evidence to shew that the instrument of appointment is a will, should have the effect of subjecting the property to duty, as if it had been the property of the testator, which this Court does not consider it to be. The question depends upon the construction of the statute of the 55 Geo. 3. c. 184, the schedule of which states the amount of probate duty payable on the estate and effects, for or in respect of which the probate is granted: and it was argued, that because probate was required, in order to shew that the property now in question was appointed by her will, the probate was granted for and in respect of this property; and therefore subject to the duty. But the 38th section of the act appears to me to shew that the act only relates to the estate and effects of the deceased, for and in respect of which the probate is granted; and as this was not the property of the deceased, I am of opinion that no probate duty is payable in respect thereof.

The last question relates to the legacy duty payable on the goods appointed by

the will of Mrs. Platt. This question appears to me to involve the same difficulty which affects the first. The act 36 Geo. 3. c. 52. s. 7. provides that any gift by will, which shall, by virtue of the will, have effect out of the personal estate of the testatrix, or out of any personal estate which the testatrix has power to dispose of as she shall think fit, shall be deemed a legacy. In this case, the gifts by the will of Mrs. Platt are to take effect out of the personal estate of John Ramsden, which she thereby disposed of, and they are to be deemed legacies, unless the restrictions to which she was subject, are to be held inconsistent with the words, "as she shall think fit," according to the meaning which ought to be attributed to them in this act. Upon the best consideration I have been able to give to this subject, it appears to me that, notwithstanding the restrictions imposed upon her, the testatrix had the power of disposing of the property as she thought fit, within the meaning of the act; and, therefore, upon this point also, I concur with the opinion of the Judges of the Court of Exchequer.

Under these circumstances, I think I ought to confirm the certificate, and refer it to the Master to ascertain the amount of duty payable according to the certificate. At the same time, there must be a stay of execution of the order, in order to allow the intended appeal to the House of Lords. The questions are certainly of that nature as make it fit that there should be an ultimate resort to that authority.

I wish to advert to one circumstance. Mr. Drake, by his petition, though he acquiesces in the certificate so far as relates to the probate duty, does not pray a confirmation of that part of it; and the Attorney General only prays the confirmation of that part of the certificate which is in his favour: so that the two petitions, taken together, do not pray for a confirmation of the whole certificate. There will be no difficulty about the order, if Mr. Drake will amend his petition to pray for a confirmation of the certificate in his favour. I think that will tend to make the order regular, and leave both parties to go to the House of Lords upon the merits. You will observe in the petition of Mr. Drake, he does not pray confirmation of that part of the certificate which is in his favour.

L.C.
Nov. 5, 1840. }
Jan. 20, 1841. } BUCKERIDGE v. GLASSE.

Baron and Feme—Pleading—Parties—Misjoinder—Breach of Trust—Expectant Interest.

By settlement made previously to marriage, an estate belonging to the husband was conveyed to trustees, upon trust, as to a moiety of the rents, for the sole use of the wife for her life, and as to the other moiety for the husband for his life; and after the death of either of them, for the survivor for life; and after the death of the survivor, the estate was to go, in default of appointment by the husband, to the children of the marriage equally. The wife joined with her husband in executing a mortgage of the trust estate for securing 700l., one-half of which was applied by the husband, for his own purposes, and the other half was lent by him to G., the surviving trustee of the settlement, who executed a bond to the husband for securing the amount and interest thereon. The surviving trustee G. executed the deed of settlement, and by his answer admitted that 350l., being one-half of the sum of 700l., had been advanced to him by the husband, but stated that he had no knowledge that the estate on which the 700l. was secured, was the subject of the settlement. On the husband's death, the widow instituted a suit on behalf of herself, and the children of the marriage, who were infants, against G. seeking the payment by G. of the 350l. and interest:—Held, that G. must pay the 350l., and one-half of the interest that accrued due thereon, during the lifetime of the husband, and the whole of the interest that had accrued due from the time of his death, and must also pay the costs of the suit.

The sum of 350l. having been found in the trustee's hands, it was held, that he could not repudiate the trusts affecting it; and that the wife's execution of the mortgage security was inoperative against her.

It is not necessary that every plaintiff should be interested in every part of the subject-matter of a suit; and in the present case, the children being interested in the whole fund, they could have sustained the suit, although relief to their mother had been refused by the Court.

In this case, the bill was filed by Eliza Buckeridge the elder, W. A. Buckeridge,

Eliza Buckeridge the younger, L. Buckeridge, Frederick Buckeridge, and C. Buckeridge, infants, by the said E. Buckeridge the elder, their mother and next friend, against A. H. Glasse as defendant thereto, whereby it was stated, that by indentures of lease and release and settlement, dated the 20th and 21st of February 1822, and made previously to the marriage of Charles Elliott Buckeridge with the said Eliza Buckeridge (then Eliza Eyre, spinster), between C. E. Buckeridge of the first part, E. Buckeridge the elder, of the second part, and A. H. Glasse and J. Cole of the third part, whereby C. E. Buckeridge conveyed to A. H. Glasse and J. Cole, and to their heirs, a rent-charge of 100*l.*, and also two undivided fifth parts in certain hereditaments of the said C. E. Buckeridge, situate in the parish of St. Giles in the Fields, in the county of Middlesex, in trust, as to one moiety of the rents, issues, and annual proceeds, for the benefit of the said E. Buckeridge the elder, for her life, for her sole and separate use; and as to the other moiety of the rents, issues, and annual proceeds for C. E. Buckeridge for his life, and after the decease of either of them, in trust as to the whole of the said rents, issues, and annual proceeds, for the survivor of them for his or her life, and after the decease of the survivor, upon trust to assign and transfer the said annuity or rent-charge, and shares of hereditaments, amongst the children of the marriage, as the said C. E. Buckeridge should appoint, and in default of appointment amongst such children equally. The bill further stated, that A. H. Glasse and James Cole neglected the trusts reposed in them by the indenture of settlement, and permitted C. E. Buckeridge to receive the whole rents and proceeds of the said two undivided fifth parts of the hereditaments, and the whole of the annuity of 100*l.*, and no part of the rents or of the annuity was paid to the said E. Buckeridge; that in 1825, C. E. Buckeridge became embarrassed in his circumstances, quitted England, and went to reside in the kingdom of France, where he continued to live up to the time of his death, which happened on the 5th of June 1835; that in December 1822, a scheme was entered into between C. E. Buckeridge and A. H. Glasse, to raise a sum of money

for their mutual benefit, upon the security of the two undivided fifth parts of the messuages and hereditaments, and a sum of 700*l.* was accordingly procured by the means of A. H. Glasse and his solicitor, and the same was received in equal moieties by C. E. Buckeridge and A. H. Glasse; that C. E. Buckeridge upon the receipt of such money in December 1822, with the privity or concurrence of the said A. H. Glasse, executed an indenture of mortgage of the said two fifth parts of the settled hereditaments, for securing the repayment of the sum of 700*l.* and interest; that A. H. Glasse executed a bond, bearing date the 23rd of December 1822, to C. E. Buckeridge, for repayment of the sum of 350*l.* and interest, at the rate of 5*l.* per cent. per annum; and the bill charged that the bond was still in full force and operation, and that the same was in the possession of E. Buckeridge, the personal representative of her late husband. And the bill further charged, that the whole of the sum of 350*l.*, with a large arrear of interest, was still due and owing upon the bond. And the bill prayed a declaration, that A. H. Glasse was liable to pay the sum of 350*l.* and interest, and a decree that the usual accounts might be taken, and the defendant ordered to pay what should be found due from him in respect of the 350*l.* and interest; that the said defendant might be discharged from being a trustee under the indenture of settlement, and that a new trustee might be appointed in his stead. The defendant by his answer stated as follows—That some time after the period when he was informed that the marriage between C. E. Buckeridge and Eliza Buckeridge the elder had taken place, and on an occasion when he was taking dinner with C. E. Buckeridge and Eliza his wife, he was requested by the said C. E. Buckeridge to sign a deed, by which he understood it was intended to secure a provision to the children of C. E. Buckeridge, by the said Eliza Buckeridge the elder, if there should be any, after the decease of C. E. Buckeridge; and it was represented to him by C. E. Buckeridge, that he would have nothing to do with the deed or trust premises thereby intended to be secured until after the death of C. E. Buckeridge, and at the same time he was also informed by C. E. Buckeridge, and believed

it to be true, that James Cole, the other trustee (since deceased), had signed it; that on the faith of such representations, and under the influence of his feelings, which were excited by an appeal made by the said C. E. Buckeridge to him, on the ground of his former friendship for him, he acceded to the request of C. E. Buckeridge; that a deed was accordingly produced to him, to which he was requested to affix, and did affix, his signature; that the deed was never read over to him, and he did not, when he executed the deed, know the contents thereof, but presumed the same to be a deed intended for the purpose represented to the defendant by C. E. Buckeridge; that C. E. Buckeridge, but not in execution of any scheme or plan between him and the defendant, but without his instigation or privity, did at the time in the bill mentioned, endeavour to raise money, and with that view did apply to C. E. Buckeridge's solicitor, J. P. B., to procure for him a loan of money upon some mortgage security; that though he admitted that J. P. B. was his solicitor, yet it was not in that character, but in the character of the solicitor of C. E. Buckeridge, that C. E. Buckeridge applied to him to raise, and that he acted in raising such money; that the defendant had been informed and believed, that the abstract of title relating to the premises which were proposed to be comprised in such security, was prepared by Mr. G., the family solicitor, and that a sum of 700*l.* was procured by or through the means of the said J. P. B., acting as the solicitor of C. E. Buckeridge, and not as the solicitor of the defendant; that the sum of 700*l.* was not received in equal moieties by C. E. Buckeridge and the defendant, but that the same was wholly received by C. E. Buckeridge, or by J. P. B. his solicitor; that about the time that the sum of 700*l.* was raised, the defendant requiring the loan of a sum of money, and having understood that C. E. Buckeridge was about obtaining money on security, applied to C. E. Buckeridge, to whom the defendant had before on several occasions lent money, and requested him to lend him a sum of 350*l.*, with which request C. E. Buckeridge complied, and accordingly the defendant having then to account with J. P. B., such sum was advanced by means of the

same being placed to the account of the defendant with J. P. B., and the defendant gave C. E. Buckeridge his bond for securing repayment of the same with interest; that C. E. Buckeridge secured the repayment of the sum of 700*l.* by executing a mortgage deed, which, as the defendant believed, was prepared by the solicitor to the mortgagees, and that C. E. Buckeridge executed such deed without the defendant having interfered to prevent him from so doing, the defendant not considering that he had in fact any right or business to interfere in the matter, or that he had any concern therewith, the defendant being then young, and of the age of twenty-three years only, and not much in the habits of business, and it never occurred to him to consider on what security C. E. Buckeridge proposed to him to obtain such loan; and if it had occurred to him, he should not have objected to the loan on the security in the bill mentioned, having no knowledge that the premises mentioned in the bill were the subject of settlement; that the said mortgage deed was executed by the plaintiff Eliza Buckeridge the elder; that the bond executed by the defendant for securing the sum of 350*l.* and interest, was not in force or operation, inasmuch as the defendant, in the year 1831, became insolvent, owing to divers unavoidable losses, and that his estate and effects having been given up by him for the benefit of his creditors, he was duly discharged by the Court for the relief of Insolvent Debtors under the provisions of the act of parliament in that case made and provided, from his debts; that the sum of 350*l.*, secured by the defendant's bond, had not been paid; and that the plaintiff, Eliza Buckeridge the elder, had been long well acquainted with all the transactions stated in the bill.

On the hearing of the cause, a decree was made by the Vice Chancellor, referring it to the Master to appoint new trustees; but so much of the bill as sought to fix the defendant with payment of the sum of 350*l.* and interest, his Honour dismissed with costs.

The plaintiffs appealed against the latter part of the decree.

Mr. Wakefield and Mr. Randell, in support of the appeal.—The decision of the

Court below was founded on the fact of the widow having been a party to the breach of trust; and the Court held, that she could not therefore sustain a suit in common with her children. A married woman, however, cannot deal with her expectant interest, depending (as in the present case) on her surviving her husband. Here there are two interests, and if two persons join in instituting a suit, and one of them has no interest in one moiety of the fund sought to be recovered, but the other has an interest in the whole subject-matter of the suit, no objection can be taken to the form of the suit. The defendant alleges, that he has taken the benefit of the Insolvent Act, 7 Geo. 4. c. 37. s. 46 & 61; but he produces no office copy of his schedule filed in the Insolvent Debtors Court, but only an office copy of the adjudication, so that it does not appear whether the liability, in respect of this breach of trust, was known to the Judge of the Insolvent Court, at the time the defendant was discharged by that Court; but in a case like the present, that act affords a party no protection.

Mr. Girdlestone and Mr. Keene, contra.—If there has been any breach of trust at all in this case, it was in respect of the whole 700*l.*, and not the sum of 350*l.* only; and it is incumbent on the plaintiffs to prove the defendant Glasse was, in December 1822, when the money was secured on mortgage, cognizant of the trusts of the settlement, and was a party to the raising of the sum secured on the estates comprised in the settlement, neither of which have the plaintiffs done. Besides, it appears on the answer, that the plaintiff, Eliza Buckeridge the elder, was a party to the raising of the money on mortgage.

[The LORD CHANCELLOR.—The money, so far as it remains in the defendant's hands, forms part of the trust fund, and the plaintiffs have a right to arrest it there. Suppose even the plaintiff, Eliza Buckeridge the elder, knew to some extent of the transactions relative to the raising of the 700*l.* by mortgage, and she puts part of the money so raised into the hands of one of the trustees of her settlement, has she not a right to lay hold of it?]

NEW SERIES, X.—CHANC.

Bill v. Cureton (1) was cited for the defendant.

The LORD CHANCELLOR.—So much of this bill as related to the payment of the 350*l.* and interest, was dismissed by the Vice Chancellor, with costs, not from any doubt as to the merits of the plaintiff's case, but because his Honour thought that Eliza Buckeridge the elder having been a party to the breach of trust, she could not be heard to complain thereof, and the infants being associated with her as co-plaintiffs, they could have no relief in respect of the breach of trust in this suit. There cannot be any doubt but that the 350*l.* was part of the trust property, and ought to be restored to the trust fund. By the settlement made on the marriage of the plaintiff Eliza Buckeridge the elder, with C. E. Buckeridge, since deceased, an estate belonging to the husband was vested in the two trustees, the defendant being the survivor of them, in trust, as to one moiety, for the separate use of the wife for life; and as to the other moiety for the use of the husband during his life; and upon the decease of either of them, for the use and benefit of the survivor for life, and on the death of the survivor, the whole to be divided amongst the children of the marriage. The name of the defendant is affixed to the deed, without any attestation accompanying it; but the plaintiffs have given proof of the name being in the defendant's hand-writing. The defendant states, in his answer, that he did not know the contents of the deed when he signed it; but if such was the case, it was his own negligence to execute it whilst ignorant of its contents. The husband, in December 1822, took on himself to convey by deed the settled property, in consideration of 700*l.*, with a power of sale to the mortgagee; the title to the property was recited as being absolute in the husband, who covenanted that he and his wife would levy a fine. Such covenant could only refer to the wife's title to dower. J. P. B. was the solicitor as well of the husband C. E. Buckeridge as of the defendant;

(1) 2 Myl. & K. 503; s. c. 4 Law J. Rep. (N.S.) Chanc. 98.

and the defendant applied to the husband for a loan of 350*l.*, to which the husband assented. The sum of 350*l.*, part of the 700*l.* so raised on mortgage as aforesaid, was paid to the solicitor of the defendant, and carried by him to the defendant's account, and the deed was then executed; and it appears clear to me, that the whole 700*l.* so raised out of the settled estate is affected with all the trusts applicable thereto, and contained in this settlement, and the *cestuis que trust* have a right to follow the sum of 350*l.* into the defendant's hands. The sum of 350*l.* (being one-half of the whole fund raised), it is admitted, from the first, was in the defendant's hands, and it may be the case that it has been in his hands without his being aware of the trusts affecting the same; but the defendant, when the sum in question is discovered, cannot repudiate the trust, and refuse to restore the amount due. The equity is plain, and it is not shewn that the plaintiff, Eliza Buckeridge the elder, was a party to the breach of trust, or cognizant of it. It is not even probable that the wife would be informed of the mortgage deed, to which the other parties added her name; the mortgage deed conceals the wife's interest in the property, and, she being a married woman at the time, her execution thereof was therefore inoperative and void against her, and she had no power over the disposition of the capital, of which the 350*l.* formed part. All the facts are wanting in this case to preclude her from suing for the 350*l.*; and if it were otherwise, the observations made on the part of the defendants, could only deprive her of a part of the relief prayed; and the co-plaintiffs would have been entitled to a decree in respect of the part. I am not inclined to extend the doctrine already laid down in the reported cases as to misjoinder of parties, for to do so must cause an infinity of suits. It is not necessary that every plaintiff should be interested in every part of the subject-matter of a suit. As to what took place in the Insolvent Debtors Court, I need make no observation; but if the error made by the defendant in endeavouring to prove his insolvency would have deprived him of material evidence, I would have remedied that. The de-

cree of the Court below must be reversed so far as it dismisses part of the plaintiffs' bill with costs; and it must be made part of my order, that the Master do take an account of the interest due on the sum of 350*l.*, which the defendant must pay, as also the costs of the suit; the defendant to pay a moiety of the interest which accrued due during the husband's lifetime, and the whole of the interest which has become due since the husband's decease.

L.C.
 Aug. 8, 1840. } WALWORTH v. HOLT.
 Jan. 15, 1841. }

Partnership—Joint Stock Company—Pleading—Demurrer—Want of Equity—Want of Parties—Accounts—Assets of Partnership.

A joint-stock banking company established under the statute 7 Geo. 4. c. 46, and consisting of numerous shareholders, stopped payment, being very largely in debt at the time: the business became wholly suspended, but not dissolved, and there were considerable assets in the hands of the directors (who had all become bankrupt except one) and trustees of the company, though not equal to the debts. The directors who had become bankrupt, had, according to the rules of the company, become incapable of acting, and the trustees had refused further to act in the affairs of the company. To a bill filed by two of the shareholders, (who had paid up their calls,) on behalf of themselves and all the other shareholders except the defendants, against the several directors, the trustees, the registered officer of the company, and such of the shareholders as had not paid their calls, and praying the assistance of the Court to relieve them from the difficulty that had arisen, by causing the assets of the company to be realized, and the debts to be paid, and that for such purpose a receiver might be appointed and authorized to sue for the calls remaining unpaid, and for the debts due to the company, in the name of the registered officer, a demurrer for want of equity and want of parties was overruled.

Quære—How far the doctrine contained in Loscombe v. Russell, 4 Sim. 11, viz. "that the Court will stand neuter in occa-

sional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible the partnership should continue," is consistent with the principle upon which Hichens v. Congreve, 4 Russ. 562, s. c. 6 Law J. Rep. Chanc. 167, Taylor v. Salmon, 4 Myl. & Cr. 134, and other cases, have proceeded.

The bill, which was filed on the 28th of May 1840, stated, that in July 1836, a number of persons, exceeding six in number, entered into partnership as bankers; and by indenture, dated the 4th of September 1837, made between John Holt and seven other persons therein named, the first board of directors of the partnership of the first part, J. Lees and J. Nuttall and R. Law, the registered public officers, of the second part, J. Hayward and T. Waller, the trustees, of the third part, and the several other persons who had executed or should execute the said indenture, of the fourth part, it was witnessed, that the said parties did thereby mutually declare and agree to and with one another, that they would respectively observe, fulfil, and perform the articles thereafter stated and contained in clauses numbered from one to eighty-four. The bill then stated the material clauses; No. 1 being to the effect, that the parties thereto, and such other persons as for the time being should be proprietors of shares in the capital, and recognizable as such within the meaning of the indenture, should constitute a joint-stock banking co-partnership, to be called the Imperial Bank of England, and should, so long as they continued partners, promote the interests of the company to the utmost of their power. No. 2 fixed the capital at 1,000,000*l.* in 50,000 shares, at 20*l.* each. No. 5 prescribed the time and mode of payment of calls. No. 7 declared that the shares on which the calls should not be paid, should be forfeited, without prejudice to the rights of the directors to sue for the amount thereof. No. 8 related to the time of commencement, and the nature of the business to be done. No. 9 provided that the business should be under the management of the board of directors. No. 10 directed that three directors at least must be present to form a board. No. 17 empowered the directors to ap-

point the persons who should be the public officers and trustees. Nos. 20 and 26 related to the holding of meetings, and the periodical choice of directors. No. 29 prescribed what should be a disqualification for a director, viz. the not holding a hundred shares, or becoming bankrupt or insolvent, or compounding with his creditors, in which case, his office should thereupon and thenceforth become vacated. No. 37 related to the drawing and signing of securities or instruments; Nos. 38, 39, and 40, to the registry of shareholders, the service of notices, and the establishment of branch banks and agencies. No. 41 provided that the conduct of all actions and suits by or against the public officer, should be under the management of the directors, and that all the officers and proprietors should at all times be saved harmless and indemnified by and out of the co-partnership, and the funds thereof, against any execution for any debt of the co-partnership. No. 42 empowered the directors to authorize and direct actions, suits, or other proceedings, as they might be advised, against any persons, shareholders or others, indebted or liable to the company. No. 63 declared the equal liability of shareholders not executing the indenture, without entitling them to any participation in its benefits. No. 71 provided, that the funds and investments of the company should be at the disposition of the board of directors. No. 76 provided, that if ever the losses of the company should have absorbed not only the whole of the fund called the Guarantee Fund, but also one-fourth part of the then paid up capital, the board of directors for the time being should, within twenty days, call an extraordinary general meeting of the shareholders, and lay a statement of the affairs before them, and that it should be lawful for any twelve of them present, to require the dissolution of the company; and No. 77 provided, that after the dissolution, the affairs and concerns should be wound up with all convenient speed, and the debts and liabilities of the company satisfied. The bill then stated, that in December 1836, the company commenced business as bankers at Manchester, with some branch banks in the neighbouring towns, and that the business was conducted

by directors, and the securities taken in the names of the trustees; that calls to the amount of 10*l.* a share, were made before April 1839; and that such calls had been duly paid by the plaintiffs on their shares, and had also been paid by the great majority of the other registered shareholders; that previous to the 30th of April 1839, the company sustained great losses in their business, and on that day the directors resolved to suspend the payments of the bank, and the same were suspended accordingly, and the business has ever since been discontinued; that at a meeting of the shareholders, which was called on the 8th of May 1839, it was resolved, that the directors should be desired to make a further call of 5*l.* per share, in order to meet and discharge the liabilities of the company, and the directors on the 13th of June, made a further call of 5*l.* a share accordingly; that the said further call of 5*l.* a share had been duly paid by the plaintiffs, and by the majority of the other registered shareholders. The bill then stated, that the partnership was indebted to various individuals, and was otherwise liable to the payment of sums of money to a very large amount; that several meetings of the shareholders and directors had taken place, but no arrangement had been come to for winding up the affairs of the company, and that since the month of February 1840, no meetings had been held, and no proceedings taken for the purpose of satisfying its creditors; that at the time the bank suspended payments, the defendant Holt and six other of the defendants, were the directors, and that since that time six of them had become bankrupt; that the said directors, however, notwithstanding their bankruptcy, still had possession or controul over the monies, securities for money, and negotiable instruments belonging to the bank, to a large amount, and that the defendants, the trustees, had also considerable property belonging to the partnership, vested in them, and that large sums of money were due to the partnership from several shareholders, in respect of unpaid calls, and from various persons on other accounts; that three qualified directors being necessary, and the trustees of the partnership refusing to deal in any manner with the property on the

authority of the single solvent director, and the registered public officer refusing in like manner to act on such authority, the debtors of the company refusing to pay their debts to the partnership, no contracts for the sale of the property of the partnership could be completed, and nothing effectual could be done for getting in or securing the property and effects of the partnership, or applying the same towards satisfaction of the debts; that the outstanding debts of the partnership remained uncollected, and without any person being authorized to interfere to secure the same, and that no qualified shareholder could be found, who would accept the office of director; that the entire property of the bank was wholly insufficient to satisfy its debts, but that the same property was, nevertheless, of a large amount, and enough to pay a considerable dividend on the said debts, but that the same could not be got in and applied, without the assistance of the Court; that the shareholders or partners were so numerous, that it would be impossible to prosecute the suit, if they were all made parties, but that all of such shareholders had a common interest in having the assets got in, and applied in payment of such debts; that several of the defendants therein named, were holders of shares, upon which the calls had not been paid up, and that there were no other shareholders, save the last-mentioned defendants, who had not paid up their calls; that such defendants, having held themselves out as shareholders of the company, were liable to the creditors thereof. The bill prayed, that an account might be taken, by and under the direction of the Court, of all the property, estate and effects, and assets of every description, of or belonging to the said partnership or company, including such several amounts as might be then due and owing from the shareholders of the said partnership or company, or any of them, in respect of unpaid calls upon the said several shares held by them respectively; and that some proper person might be appointed by the Court to collect, get in, and receive the said property, estate, and effects, and other assets of the said partnership, including the amount of such unpaid calls, and that such receiver might be at liberty to use the name of the regis-

tered public officer, or the name of such other officer or officers of the said partnership, as might be necessary in any proceedings, whether at law or otherwise, for recovering or enforcing payment of the said property and estate, including the unpaid calls or any part thereof; and that the defendants, John Holt, Samuel Fox, John Gunson, William Marston, William Nicholson, William Nuttall, Samuel Walker, Nicholas Price Wood, John Hayward, Thomas Waller, and Richard Law, might be decreed to deliver up, and to duly assign or otherwise assure to the said receiver all monies and securities for money, property, and effects whatsoever, of or belonging to the said partnership, now in their respective possession, or under their respective controul; and all deeds, evidences of title, books, accounts, papers, documents, and writings, in their respective possession or power, or in anywise relating thereto; and that such parts of the property, estate, and effects of the said partnership as required to be sold, might be sold under the direction of the Court; and that all proper parties might be ordered to join in such sale, and all proper directions given for effectuating the same; and that the last-named defendants, and all other the officers and servants of the said partnership and company might be restrained by the order and injunction of the Court from collecting, getting in, or receiving, or in any way possessing themselves of or intermeddling or dealing with the said property, estate, and effects, and other assets of the said partnership, or any part thereof then outstanding, and from assigning or parting with any part thereof then in their possession or power, or otherwise than to the said receiver, or under the direction of the Court; and that an account might be taken under the direction of the Court, of the several debts and liabilities due and owing from the said partnership, or to which the said partnership was subject; and that the said property, estate, and effects, and other assets of the said partnership, including the amount of the said unpaid calls, might be duly and properly applied towards payment and satisfaction of the several debts and liabilities, so far as the same would extend for that purpose; and that all such proper directions might be given, and

accounts taken, and inquiries directed as might be necessary for the purposes aforesaid.

George Aspinall and Richard Wilding Bateson, two of the defendants to the bill, appeared; and, on the 17th of June 1840, filed their demurrer to the bill, whereby, by protestation, not confessing or acknowledging all or any of the matters in the said bill of complaint contained to be true, in such manner and form as the same was therein and thereby set forth and alleged, the said defendants, George Aspinall and Richard Wilding Bateson, demurred to the said bill, and for cause of demurrer shewed that the said complainants had not by their said bill of complaint made such a case as entitled them in a court of equity to any discovery from the defendants or either of them, or to any relief against them, or either of them, as to the matters contained in the said bill, or any of such matters; and for further cause of demurrer, the said defendants shewed, that it appeared by the said bill, that there were divers other persons who were necessary parties to the said bill, but who were not made parties thereto; and, in particular, that it appeared by the said bill, that all the partners or shareholders in the said partnership or company, called the Imperial Bank of England, were necessary parties to the said bill, but that all such partners or shareholders were not made parties to the said bill; and further, that it appeared by the said bill, that fiats in bankruptcy had been duly awarded and issued against Thomas Waller, John Holt, Samuel Fox, William Marston, William Nuttall, Samuel Walker, and Nicholas P. Wood, seven of the defendants to the said bill of complaint, under which they had been severally found and declared bankrupts, and assignees of their several and respective estates and effects had been duly appointed; and that it appeared by the said bill, that such assignees of the estate and effects of the said Thomas Waller, John Holt, Samuel Fox, William Marston, William Nuttall, Samuel Walker, and Nicholas P. Wood respectively, were necessary parties to the said bill, but that such assignees were not made parties to the said bill; and for further cause of demurrer, the said defendants shewed that the said bill was exhi-

bited against the said defendants, and against the said several other defendants to the said bill, for several and distinct and independent matters and causes, which had no relation to each other, and in which, or in the greater part of which, the said defendants were in no way interested or concerned, and might not be implicated; wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, the said defendants did demur to the said bill, and all the matters and things therein contained, and prayed the judgment of this Honourable Court, whether they should be compelled to make any further or other answer to the said bill; and they humbly prayed to be thence dismissed, with their reasonable costs in that behalf sustained.

The demurrer was heard before the Vice Chancellor on the 7th of July 1840, when the same was allowed, liberty being, at the same time, refused to the plaintiffs to amend the bill. The plaintiffs appealed from the order allowing the demurrer.

Mr. G. Richards and *Mr. Rolt*, in support of the appeal, contended, that no injustice would be done to the shareholders by the appointment of a receiver, any more than would have arisen from the registered officer taking proceedings to recover the unpaid calls; that unless the Court interfered, the property, which the company still possessed, might be wholly wasted and lost, and that the partners in the company were so very numerous, as to render it quite impossible to bring the suit to a hearing in case it should be held that they were necessary parties thereto.

Mr. Jacob, *Mr. Wigram*, and *Mr. Sutton Sharpe*, for the respondents, who had demurred to the bill, contended, that, as the bill was constituted, the defendants, the solvent shareholders, would have no security against their being subsequently required to pay off the partnership debts, in case they satisfied the calls, of which the bill sought payment; that the only secure mode of proceeding would be to have a dissolution of the partnership, which was not prayed by the bill, and a sale of its assets, and a contribution from all the shareholders, for the purpose of supplying any deficiency arising from the sale of the assets in payment of the partnership debts.

Besides the cases referred to in the Lord Chancellor's judgment, the following were cited in the course of the arguments:

Small v. Attwood, You. 407; s. c. 8 Law J. Rep. (N.S.) Ex. Eq. 1.

Mare v. Malachy, 1 Myl. & Cr. 559; s. c. 5 Law J. Rep. (N.S.) Chanc. 345.

Long v. Yonge, 2 Sim. 369.

Evans v. Stokes, 1 Keen, 24; s. c. 5 Law J. Rep. (N.S.) Chanc. 129.

THE LORD CHANCELLOR.—The demurrer in this case was allowed by the Vice Chancellor, for want of equity, upon the ground, as I am informed in the argument, that the Court could not grant relief of the limited kind prayed by the bill; but on this appeal, all the grounds in support of the demurrer are open to the defendant, and in a court of equity, want of equity, want of parties, and multifariousness, are good grounds of demurrer. With respect to the last, I have not been able to discover anything in support of it, and shall therefore take no further notice of it. The case stated by the bill, which is filed by the plaintiffs, on behalf of themselves and all other the shareholders and partners in the banking company, called the Imperial Bank of England, (except those who are made defendants,) is shortly this—viz. that they are shareholders, and have paid all the calls made, which amount to 15*l.* per share; that the business of the company has been suspended since 1839, but that it has not been dissolved; that large debts are due by the company, for which the plaintiffs and other shareholders are liable, and there are considerable assets in the hands of the directors and trustees, though not equal to the debts; that all the directors except one have become bankrupts, and have thereby by the regulations become incapable of acting; that the trustees refuse to act, and that the other defendants are the only shareholders who have not paid their calls; and the bill therefore prays for the assistance of the Court to relieve them from this difficulty, by causing the assets of the company to be realized, and the debts to be paid, and that, for this purpose, a receiver may be appointed and authorized to sue for the calls unpaid, and for the debts due to the company, in the name of the registered officer, (under the

stat. 7 Geo. 4. c. 46,) who is one of the defendants. When it is said, that the Court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution and a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say anything at present beyond what is necessary for the decision of this case, but there are strong authorities for holding that to a bill praying a dissolution, all the partners must be parties; and this bill alleges, that they are so numerous as to make that impossible. The result, therefore, of these two rules, if both are to be supported, would be,—the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it,—that the doors of the Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of this realm, in some of the most important of their affairs. This result is quite sufficient to shew, that such cannot be the law. As I have said on other occasions, I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice, and to enforce rights for which there is no remedy. This has always been the principle of this court, though not at all times sufficiently attended to; it is the ground upon which the Court has, in many cases, dispensed with the presence of parties, who were, according to the general practice, necessary parties.

In *Cockburn v. Thompson* (1), Lord Eldon says, "A general rule established for the convenient administration of justice, must not be adhered to, in cases to which, consistently with practical convenience, it is incapable of application:" and again, "The difficulty must be overcome on this princi-

ple, that it is better to go as far as possible towards justice than to deny it altogether." If, therefore, it was necessary to go much further than is required in the present case, and in opposition to some highly sanctioned opinion, in order to open the doors of justice in this court to those who could not obtain it elsewhere, I should not shrink from the responsibility of so doing; but in this particular case it will be found, there is much more of authority in support of the equity claimed by the bill than there is against it. It is true, the bill does not pray for a dissolution, and it states the company to be still subsisting; but it does not pray for an account of the partnership dealings and transactions for the purpose of ascertaining the share of profits due to the plaintiffs, which seems to have been the case, in the opinions to which I have referred. Its object is to have the partnership assets realized, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice; but whether the interest of the plaintiffs, in right of which they are suing, arises from such responsibility, or from any other cause, cannot be material, the question being, whether, some partners, having an interest in the application of the partnership property, are entitled on behalf of themselves and the other partners, (except the defendants,) to file a bill in this court against others of the partners for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced, against other persons, whether trustees or agents of the company, being possessed of property of the company, it may be asked, why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder? In *Chancery v. May* (2), the defendants were partners. In *The Widow's case*, before Lord Thurlow, cited by Lord Eldon, in 17 *Ves.* 15, the bill was on behalf of the plaintiff and all others in the same interest, to provide the funds for a subsisting estate. In

(1) 16 *Ves.* 321.(2) *Proc. in Ch.* 592.

Knowles v. Houghton (3), the bill prayed an account of partnership transactions, and that the partnership might be established; and the decree directed an account of the brokerage business, and an inquiry to ascertain what, if anything, was due to the plaintiff, in respect thereof, and whether the partnership between the plaintiff and defendant had at any time and when been dissolved,—shewing the Court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In *Cockburn v. Thompson*, the bill prayed a dissolution; but it was filed by certain proprietors, on behalf of themselves and others, and Lord Eldon overruled the objection, that the other proprietors were not parties. In the case of *Hichens v. Congreve* (4), the bill was on behalf of the plaintiff and other shareholders, against certain shareholders who were also debtors, not praying a dissolution, but asking only the repayment to the company of certain funds alleged to have been improperly abstracted from the partnership property by the defendants; and Sir Anthony Hart overruled the objection, which decision was afterwards affirmed by Lord Lyndhurst.

In *Walburn v. Ingilby* (5), the bill did not pray a dissolution of the partnership; and Lord Brougham, in allowing the demurrer on other grounds, stated, that it could not be supported on the ground of want of parties, because the dissolution was not prayed. In *Taylor v. Salmon* (6), the suit was by some shareholders, on behalf of themselves and others, against another person also a shareholder, to recover property claimed by the partners, which he had appropriated to himself; and the Vice Chancellor decreed for the plaintiff, which was affirmed on appeal. In that case, the bill did not pray a dissolution, and the company was a subsisting and continuing partnership.

The case of *Hichens v. Congreve* differs from the present, in this particular, that in that case, the partnership was flourishing

and likely to continue, whereas the present partnership, though not dissolved, is unable to carry on the purposes for which it was formed, an inability to be attributed in part to withholding the property which the bill seeks to recover. So far this case approximates to others, in which the partnership has been dissolved, as to which it is admitted this Court exercises jurisdiction. This case also differs from the two last-mentioned cases, in this—viz. that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of the Court, is greater in the present, but there is certainly no reason for withholding the assistance of the Court. How far the principle on which those cases have proceeded is consistent with the doctrine in *Loscombe v. Russell* (7), “that in occasional breaches of agreements between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter,” may be to be considered if the case should arise; it is not necessary to express any opinion as to that, in the present case; but it may be suggested, that the supposed rule, that the Court will not direct an account of partnership dealings and transactions, except consequent on a dissolution, though true in some cases and to a certain extent, has been supposed to be more generally applicable than it is upon principle, and it is certain, that this supposed rule is directly opposed to the decision of Sir John Leach, in *Harrison v. Armitage* (8), and *Richards v. Davies* (9).

Having referred to so many cases, in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say anything as to the objection for want of parties, or as to the assignees of those shareholders, who have become bankrupts. Their assignees are now shareholders in their place, for the purpose of any interest they had in the property, and as such are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled in *Taylor v. Salmon*, as to the shares of Mr. Salmon.

(3) 11 Ves. 168, but more fully reported in Collier on Partnership, 198.

(4) 4 Russ. 562; s. c. 6 Law J. Rep. Chanc. 167.

(5) 1 Myl. & K. 61; s. c. 3 Law J. Rep. (n.s.) Chanc. 21.

(6) 4 Myl. & Cr. 134.

(7) 4 Sim. 8.

(8) 4 Mad. 143.

(9) 2 Russ. & Myl. 347.

On the authority of the cases to which I have referred, and the principles to which I have alluded, if it be necessary to resort to them, I am of opinion, the demurrer cannot be supported, and that the usual order overruling the demurrer must be substituted for that pronounced by the Vice Chancellor.

V.C. }
Jan. 12. } ——— v. CHRISTOPHER.

Affidavit — Signature — Marksman — Taking Bill and Affidavit off the File.

The plaintiff, in a bill of interpleader, being a marksman, signed the affidavit with his name, having his hand guided by another person: the bill and affidavit were ordered to be taken off the file.

The affidavit of the plaintiff, annexed to his bill of interpleader, he being a marksman, was signed with his name at length, and it appeared that his hand had been guided in writing it by another person. The jurat and attestation was in the form applicable to the signature of one who was not a marksman.

Mr. K. Bruce, on behalf of the defendant, moved, that the bill and affidavit should be taken off the file.

Mr. Stephenson, contra.

The VICE CHANCELLOR said, that the manner in which the signature was affixed was a fraud upon the Court; and he ordered the bill and affidavit to be taken off the file, and the costs to be paid by the plaintiff.

V.C. }
Dec. 19, 1840. } CHRISTIAN v. TAYLOR.
Jan. 12, 1841. }

Pleading — Discovery — Executors and Trustees — Accounts — Documents — Sufficiency of Answer.

Defendants in the situation of representatives to a deceased person, alleged to have been an accounting party, are not by their answer bound to set forth the accounts of that party in a manner in which they can

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only be made out with much difficulty and expense; but it is sufficient that they set forth the accounts so far as they are themselves able, and at the same time so refer to the documents from which the accounts must be made, as to give the plaintiff the opportunity of using them for the purpose of making out such accounts as are necessary.

When the documents inquired after by the usual form of interrogatory, are very numerous, it is sufficient, in the schedule to the answer, to describe them by their general character, as contained in sealed packages, without setting forth a detailed description of the several documents.

P. Callow and R. Taylor entered into partnership as wholesale grocers, at Liverpool, in 1799. P. Callow was also from the year 1802, a partner in a brewery in which R. Taylor had an interest; and Callow and Taylor also occasionally engaged in joint speculations in cotton and other merchandise, and became owners of various houses and warehouses. In December 1832, Callow and Taylor executed a deed of dissolution of partnership, and, by the same deed, Callow assigned and transferred his share of the grocery business and partnership property to Thomas Taylor and the defendant William Taylor, sons of the said R. Taylor, in consideration of an annuity of 1,000*l.*, and a sum of 1,500*l.*, the payment of which was secured by the bond of the Taylors. Callow died intestate in February 1833, leaving the plaintiff, Elinor Christian, his sister and next-of-kin. Thomas Taylor died in January 1834, having appointed R. Taylor, the father, and William Taylor, his executors. R. Taylor died in June 1837, having appointed the said William Taylor and the defendant John Taylor, (another son,) his executors. The bill was filed by Mrs. Christian against William and John Taylor, and it prayed that an account might be taken of the partnership dealings and transactions, and claimed to set aside the deed of dissolution of December 1832, as fraudulent.

The bill called upon the defendants to set forth an account of the profits made in the said partnership, in each and every year, from the commencement to the dissolution, and the quantity of merchandise

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purchased on each speculation and the prices paid, and by what monies, and the prices at which the merchandise so bought was on each occasion sold, and what was the profit and loss, and how the monies arising from the sale were applied on each occasion, and of all the monies paid to each of them, P. Callow and R. Taylor, and the dates and amounts. The bill also required the defendants to set forth a schedule of the papers and writings in their possession relating to the matters in question, in the usual form of interrogatory.

The defendants, by their first, second, and third answers, stated, in substance, that they could not, according to their knowledge, remembrance, information, or belief, set forth the particulars required, with respect to the said partnership dealings and transactions; that they had employed an accountant at a great expense constantly for about six weeks, during which time such accountant had with much labour been able only to make out an account of the said partnership business, in the manner required, for a very short space of time and for less than a year; that the books and papers containing the particulars of the transactions, were open to the inspection and use of the plaintiff or her agents; and that if the defendants were compelled to make out the required accounts during the whole period of the partnership, the expense and loss of time occasioned by so doing, would be ruinous to them.

In answer to the interrogatory as to documents, the defendants stated, that they had in their possession three hogsheads containing old papers and writings, sealed up, and relating to the said partnership business. In the second answer, the defendants stated that the old papers and writings referred to in their former answer, consisted of invoices, orders, &c. (describing them generally); and in the third answer, they stated that a detailed list or specification of such documents, would occupy a schedule of enormous length, the making of which would consume more time, by many weeks, than had been allowed by the Master for putting in a further answer.

Seven exceptions for insufficiency were taken to the answer, on these points, and were allowed by the Master. The defendants excepted to the Master's certificate.

Mr. K. Bruce and Mr. Walker, for the defendants.

Seeley v. Boehm, 2 Madd. 176.

White v. Williams, 8 Ves. 193.

Mr. Jacob and Mr. J. Russell, for the plaintiff.

[The VICE CHANCELLOR, in the course of the argument, said—Suppose that the defendants, who were merely executors, were called upon by a plaintiff to set forth accounts of this kind, and they stated by their answer that they had never looked into the partnership books, and never intended to do so—what objection would there be to this answer in point of form? What obligation would there be upon them to go through the books, for the purpose of giving the plaintiff the particular information which he asks? A party is not bound to do so with respect to transactions, which are not his own.]

Mr. K. Bruce, in reply.

The VICE CHANCELLOR.—Before I decide this point, I shall compare minutely the words of the interrogatories with those of the answers. As to the papers said to be sealed up in boxes or hogsheads, I must say, I should be reluctant to hold, that that is not a sufficient description of them. Ever since I have known the profession, it has been the practice, after setting out the more important and special documents, to state that there are others made up in bundles, which are referred to, and may be moved for by the plaintiff. If the defendant states that there are three hogsheads of documents, which are sealed up, I think that sufficiently identifies them, for all the purposes of discovery.

Jan. 12.—The VICE CHANCELLOR.—Since this case was argued before me, I have had the opportunity of comparing the language of the last answer, with the terms of the exception; and it appears to me, I must hold the answer to be now sufficient. There are only two points which require any observation: first, as to the amount of profits which is required to be set out. It appears, that Mr. Callow and Mr. Richard Taylor entered into partnership in the year 1799, and carried on business as wholesale grocers, in partnership,

until the month of December 1832. They were also shareholders in a brewery, which was not a part of the partnership business. In December 1832, this transaction took place: the partners being interested in the business in equal moieties, Thomas Taylor and William Taylor, two of the sons of Mr. Richard Taylor, became purchasers of Mr. Callow's moiety of the partnership business and property, and that moiety was then assigned to them. The bill in this suit complains of that transaction as unfair, and one ground of complaint is, that the consideration was inadequate. It appears on the face of the instrument, that the consideration for the assignment was, the payment by Thomas and William Taylor, of an annuity of 1,000*l.* to Mr. Callow, and also of a sum of 1,500*l.* in respect of the share of Mr. Callow, in certain tenements belonging to the partnership. There are some statements with regard to the habits of Mr. Callow, as being so intemperate, that they tended to shorten life. It appears that he died in February 1833, before more than one quarter's payment of the annuity had become due; and left the plaintiff, his sister, surviving, who afterwards became administratrix of his estate. In 1834, Thomas Taylor died, having appointed his father and his brother William his executors. In 1837, the father died, leaving his son William, the surviving partner, and another son, John Taylor, his executors, who are the present defendants. The bill is filed in November 1838, against William and John Taylor, and it seeks to set aside the transaction of December 1832, and to have the accounts of the partnership taken. William, who is the only surviving partner, and John, who is one of the executors of the father, collectively represent the deceased partners, and their estates, that is to say, Thomas, who became a partner upon the footing of the transaction in 1832, and Richard, the father, who was a partner with Mr. Callow, from the year 1799.

The bill is very properly framed for the purpose of shewing, that the transaction with regard to the dissolution was unfair; and, for this purpose, it is evidently material to shew the amount of the profits of the partnership down to the year 1832. It must be observed, however, that the de-

fendant, William Taylor, had nothing to do with the profits of the partnership, until the month of December 1832; and the other defendant John is only concerned in those profits in his representative character, and cannot be assumed to have any greater degree of knowledge with respect to such profits than Mrs. Christian, the plaintiff, can have, in her representative character. The answer states, that it has required great labour and expense to make out an account of the nature which is required, even during a very short time,—a few months of the period over which the partnership extended. Lord Eldon, in the case of *White v. Williams*, held, that the defendants, who were trustees, were bound to give the best account by their answer that they could. He says, the Court requires them to give all convenient opportunity for the inspection of books, and to refer to them, so as to make them part of the answer, and so as to ascertain whether that is the best account they can give. "The plaintiff has a right to compel them by their answer to say, that is the best account they can give." Lord Eldon afterwards adds:—"I give no opinion, whether the trustees are bound to state them otherwise than thus, that they have laid the accounts, from which the totals will appear, in the Master's office; and that those accounts enable the plaintiff to learn as much as they themselves know of them."

Now, in the present case, it is stated by the answer, that the defendants have attempted to make out the accounts in the manner in which they are sought to be obtained, and that they are not able to render such accounts; at least, without a degree of inconvenience, which it is evident would operate very oppressively upon them. They then refer to the books and documents in which the particulars of the accounts must be found, and give the plaintiff the opportunity of making them out as fully as the defendants could do themselves. It appears to me, that the observations of Lord Eldon, in *White v. Williams*, do not intimate that the defendants in such a case could be required to do more; and, attending to the nature of this case, I think the defendants must be taken to have answered sufficiently.

The second point is, as to the documents.

The defendants are asked to set forth a list of the documents in the usual manner. In the first answer, the defendants state, that they have in their possession three hogsheads sealed up, the contents of which consist of old papers, relating to the business of the partnership. In the second answer they say, that the old papers sealed up in the three hogsheads, as stated in the former answer, consist of invoices of goods, orders, &c., giving to them a general character. And in the third answer they state, that a detailed list of the documents referred to in the former answers would occupy a schedule of enormous length, the making of which would consume more time than has been allowed for putting in a further answer. With respect to this answer, I have always understood the practice to be, to refer to documents as contained in bundles or boxes, or by other descriptions of that kind; and if the bundles are tied up, or the boxes sealed, or the papers otherwise so connected together, that an order can be made for their production under the descriptions given, that has always been considered sufficient. In this case it appears to me, the defendants are not bound to give a list of the documents contained in the hogsheads; and that the answer, with respect to these documents, is sufficient.

Exceptions to the Master's certificate allowed.

M.R. }
Jan. 14, 15. } STUART v. STUART.

Trust—4 & 5 Will. 4. c. 29—Investment of Trust Fund on Real Securities in Ireland.

A, being entitled for her life to the income of a trust fund, in which other persons were interested in remainder, who were infants and married women, presented a petition, praying that the trust fund might be invested upon real securities in Ireland, under the authority of 4 & 5 Will. 4. c. 29. The Court refused to make the order, as it was not shewn that such an investment would be beneficial to the parties who were entitled in remainder.

This was a petition under the 4 & 5

Will. 4. c. 29 (1). It was presented by the widow of the testator in the cause, who was entitled for her life to the interest of a large sum of money which had been brought into court, and was standing to the credit of the cause. The petition prayed, that the petitioner might be at liberty to lay before the Master proposals for investing the whole, or part of the trust fund, on real securities in Ireland; and if the Master should approve of the proposal, then that he should inquire and report to the Court, whether a good title could be made to the estates proposed to be mortgaged.

The testator had directed his trustees to sell his real and personal estate, and to invest the proceeds "in the public funds of Great Britain, or at interest upon government or real securities in England or Wales," and to vary the investment at discretion.

Out of the trust fund, each of the testator's two daughters, who were infants, was entitled to the interest of 10,000*l.*; and the testator's widow was entitled to the income of the remainder of the fund; and, subject to the life estate of the widow, the whole fund was bequeathed to the testator's two daughters in equal shares, if they attained twenty-one or married under that age with consent; but if they died before

(1) By the 1st & 2nd sections of this act it is enacted, "That from and after the passing of this act, it shall be lawful for any person or persons, who, under or by virtue of any direction, trust, or power already given, created, or reserved, or hereafter to be given, created, or reserved as aforesaid, is or are or shall be authorized or directed to lend money at interest on real securities in England, Wales, or Great Britain, to lend the same, or any part thereof, at interest, on real securities in Ireland, in the same manner, in all respects as if such investment had been expressly authorized in or by such direction, trust, or power as aforesaid, and such person or persons shall not, on account of his or their so lending money on real securities in Ireland, be considered, in a court of equity, guilty of any breach of trust, or held accountable further or otherwise than if the money had been laid out by him or them on real securities in England, Wales, or Great Britain. Provided always, that all loans of money on real securities in Ireland, under this act, in which any minor or unborn child or person of unsound mind, is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any cause, upon petition, in a summary way."

their interests became vested, there was a gift over to other parties, among whom were infants and married women.

Mr. S. Sharpe appeared in support of the petition, and—

Mr. Pemberton, on behalf of the plaintiffs, who were infants, opposed it.

Mr. J. J. Jervis appeared for other parties.

Jan. 15.—The MASTER OF THE ROLLS said, that it was the duty of the trustees to protect the fund for the benefit of all the parties interested in it: that it might be advantageous for the petitioner to have the fund invested upon mortgage in Ireland, because it might then produce a larger income, but that it did not appear that such an investment would be beneficial for the parties who were interested in remainder, and that the Court would therefore decline to make the order which was prayed.

L.C. } WILLIAMS v. THE EARL OF
Jan. 15, 18. } JERSEY.

Injunction—Nuisance—Damages—Jurisdiction—Acquiescence in or Encouragement of Nuisance—Conduct.

A filed a bill against *B*, praying a declaration that *A* was entitled to use and practise the smelting of copper ores, at *A*'s copper works, and that *A* might be quieted therein, and that *B* might be restricted from proceeding in an action brought by him to recover damages against *A*, in respect of the injury done to the grass, herbage, and lands belonging to him, and adjoining the copper works, by means of the deleterious matters arising from the smelting of copper ore. The bill alleged, that *B* had known of the existence of the copper works during several years past, and was acquainted with them whilst they were being erected, and encouraged *A* in the erection thereof, and in the expenditure of large sums of money thereon:—Held, on demurrer, for want of equity, that the demurrer was bad.

Semble—*A*, having an equity, loses that equity as against *B*, by permitting *B* to proceed and deal with property in ignorance of the equity of *A*, so standing by and per-

mitting another interest to arise inconsistent with that equity.

Semble, also, that it is the duty of a party, seeing a nuisance in progress, to give notice to a party erecting the same, of his intention to object thereto.

In this case the bill was filed by the plaintiffs against the Earl of Jersey, praying a declaration by the Court, that the plaintiffs were entitled to use and practise the smelting of copper ores, and the manufacture of copper at their copper works, without interruption by the defendant, and that the plaintiffs might be quieted in the use and enjoyment of their works; and that the defendant might be enjoined from molesting the plaintiffs in the peaceable use and enjoyment of their copper works, either by prosecuting the action already commenced by the defendant against the plaintiffs, or by commencing any other action against them, with reference to their works, and from further prosecuting the said action already commenced against the plaintiffs.

The bill stated, that the plaintiffs, for several years past, had been in the occupation of certain works used for smelting copper, situate near Swansea, and named the Rose Works, the Landore Works, and the Morfa Works; the Morfa Works standing on land belonging to the Duke of Beaufort: that the plaintiffs entered into possession of the Rose Works in the year 1821, the Landore Works in the year 1828, and in 1830 erected the Morfa Works, and had ever since been in possession thereof, and by the means thereof carried on the process of smelting copper ores, and the manufacture of copper: that the defendant, by the will of W. A. H. V. Mansel, in 1814, became absolutely entitled to the Briton Ferry estate, situate on the left bank of the river Taff, and on the side of that river opposite to that on which the plaintiffs' copper works were situate: that the plaintiffs and their several and respective predecessors in the said copper works, called the Rose Works and the Landore Works, were induced, by the acquiescence of the defendant in the erection and establishment of the last-mentioned copper works respectively, and in the smelting of copper ores, and the manufacture of copper

therein, to lay out, and they did lay out, very large sums of money in the improvement and extension of the works respectively, and in the machinery employed therein; and such expenditure, whilst the same was in progress, was well known to the defendant, who never made any objection thereto: that the Morfa Works were erected upon land of the Duke of Beaufort, which was derived by way of exchange from George Lord Vernon and the said W. A. H. V. Mansel, under certain indentures of lease and release, dated the 18th and 19th of May 1810, and such exchange was effected for the purpose of works (viz. the Morfa Works) being erected on such lands by the Duke of Beaufort, or by persons taking the same lands from him: that the land on which the Morfa Works were afterwards erected, was part of certain lands taken in exchange many years ago from the defendant's predecessors, in lieu of other lands conveyed to him by the Duke of Beaufort; and that the plaintiffs now possessed the same land from the Duke of Beaufort, under a lease for ninety-nine years, commencing the 29th of September 1823: that during the progress of the erection of the Morfa works and buildings in 1831, the defendant well knew or was aware that the same were being erected and made, and were for the purpose of smelting and the manufacture of copper; and that he was well aware of the deleterious effect on vegetation produced by such manufacture; nevertheless the defendant allowed the plaintiffs to proceed in the erection of the Morfa Works, and to expend large sums of money thereon, and in completing and furnishing the same with the requisite machinery and plant, without making any objection thereto; and the defendant acquiesced in and encouraged the erection of such works, and the aforesaid expenditure of the plaintiffs, upon or with respect to the same: that ever since the Morfa Works had been built and completed, the smelting of copper ores, and the manufacture of copper, had been carried on therein without any interruption or disturbance, and without any complaint from or by the defendant, until the bringing of his action against the plaintiffs, in respect of his reversionary interest in the adjoining farms and premises, in June 1840, for the

recovery of damages in respect of the injury alleged by the defendant, in his declaration, to arise to the grass and herbage upon those premises from the smelting of copper ore: that for more than 100 years and upwards, previously to the time of the defendant's bringing the action against the plaintiff, it had been the established custom and usage at Swansea, and the neighbourhood thereof, to allow the erection of copper works, and the use and practice of smelting ores therein, without any restriction whatever, and without any complaint on the ground of any alleged nuisance being committed thereby; and the destruction and corruption of the vegetation upon the defendant's farms and premises existed in the same degree for the period of twenty years and upwards, before the action was brought, and produced by the same causes.

The defendant filed a general demurrer, for want of equity, to the bill, which was argued before the Vice Chancellor on the 20th of July 1840.

In support of the demurrer it was contended, that the bill was informally framed, and did not contain the allegations requisite to support the prayer, viz. that the plaintiffs were, or believed themselves to be, remediless at law; that the case of *Edwards v. Edwards* (1), before Lord Eldon, on appeal, was directly in support of the demurrer; that bills for quieting possession could only be filed where the plaintiffs' rights had been previously established, and where other persons were vexatiously and repeatedly calling into question that which had been previously and judicially established; that in *Brown v. Newall* (2), it was laid down, that the plaintiff must in his bill not only allege, but make it plain to the Court, whether he has or not a case at law; that if the plaintiffs could plead twenty years' use, or sixty years leave and licence, it was a good plea at law, and the demurrer must be allowed.

For the plaintiffs it was contended, that if there was an equity in favour of the plaintiffs, arising from conduct or from contract, or conduct from which contract might be inferred, or, which in equity

(1) Jac. 335.

(2) 2 Myl. & Cr. 558; s. c. 6 Law J. Rep. (N.S.) Chanc. 348.

would be held to be a contract, then there was an equity which rendered it improper for the defendant to disturb the plaintiffs in the enjoyment of that which he had either sanctioned or licensed; that, too, independent of the question, whether there was a legal enjoyment or not: that a party might file a bill against a defendant to put him to elect, alleging that he had elected to take some other property, and to give up to the plaintiff in equity the property which was the subject of the suit; and that he was nevertheless bringing an action of ejectment against the plaintiff in equity to recover that property; that in such a case it would be no answer to say, that the plaintiff might, by means of some term, have a legal defence to the action, for the plaintiff was proceeding upon a paramount equity: that every bill for quieting the plaintiffs' possession might be framed on any species of disturbance, threatened or commenced, as in the case of a bill filed to establish a modus, where the plaintiff, in his bill, generally alleges that a modus has always been recognized and acquiesced in until a recent period, when the defendant laid claim to the tithes in kind: that the case being one in which, if the facts stated in the bill were proved on the trial of the action at law, the plaintiff at law could only recover nominal damages, the plaintiffs were entitled, in this court, on equitable grounds, to stay the proceedings at law, which would only subject the plaintiffs here to costs and vexation: that the defence at law, by plea of leave and licence from the Earl of Jersey, ought not to preclude the plaintiffs in equity from having recourse to an equitable defence, inasmuch as the cases in which a jury may presume, from uncertain acts, must be always involved in the greatest degree of uncertainty: that the action, which the defendant had commenced, was not in respect of a personal grievance to himself or his family, but for an injury to his reversionary interest in the land held by his tenants, being the lands of the Briton Ferry estate, from which the exchange was cut out for the purpose of erecting the copper works complained of, so that the defendant was bringing an action in respect of a right vested in these very persons, his predecessors, who made the

exchange for that purpose, the defendant being bound by their acts just as much as if they were his own acts; and that the bill stated, not only acquiescence, but also encouragement on the part of the defendant, in the erection of the Morfa Works.

Mr. Tennant, in support of the demurrer:

Mr. Knight Bruce and *Mr. Jacob*, contra.

The VICE CHANCELLOR having overruled the demurrer, the defendant presented his petition of appeal from his Honour's decision; and on the 15th of January 1841, the case was argued by—

Mr. Wigram and *Mr. Tennant*, on behalf of the appellant; and by—

Mr. Jacob, *Mr. Bethell*, and *Mr. Lloyd*, on behalf of the respondents; and on the 18th of January 1841, his Lordship delivered his judgment as follows:—

The LORD CHANCELLOR.—In this case it is not necessary for me to observe on any other points of the bill, except that which relates to the Morfa Works. There are two grounds upon which it is alleged that the demurrer must be overruled. The first is what is stated as to the purpose for which the exchange of the lands took place. It is said, that when the exchange took place, those who claimed the estate, now possessed by Lord Jersey, were aware of the purpose for which the exchange took place, and that the Duke of Beaufort intended to apply the lands so taken in exchange, for the purpose of establishing copper works upon those pieces of land. I do not think it necessary to give any opinion as to that part of the case. If it were necessary, it would be important to consider the doctrine upon which I acted in the case of *Squire v. Campbell* (3); but I do not pursue that inquiry, because there are other parts of the case which I think sufficient for the purpose of disposing of the present question.

It was then alleged, that there was sufficient, in what the bill states to have been the conduct of Lord Jersey with respect to the property, to preclude him from the right of interfering, and applying to the jurisdiction of this Court, or to have the benefit of any jurisdiction which the Court

(3) 1 Myl. & Cr. 459; a. c. 6 Law J. Rep. (n.s.) Chanc. 41.

might exercise in the case of a nuisance. The allegation in the bill is, that whilst these works were in progress he was aware of it, and that he encouraged it. Of course it must be assumed, on a demurrer, that what the bill alleges is true; and the question is, whether, if the facts were established as they are alleged, a case exists in which the plaintiff is entitled to the interposition which he prays. Now, there certainly are cases in which a party having an equity, loses that equity as against another person, by permitting that other person to proceed and deal with property in ignorance of the equity of the party so standing by and permitting another interest to arise inconsistent with that equity. In the case of *Jones v. the Royal Canal Company* (4), Sir Anthony Hart went to this extent, viz. that it was the duty of a party seeing a nuisance in progress, to give notice to the party erecting the nuisance of his intention to object thereto. It is unnecessary to say under what circumstances a party might be affected by that course of conduct, but certainly it is a recognition by Sir Anthony Hart that such a case might exist. There is a very short note of the decision; but assuming the note to be an accurate statement of what fell from Sir Anthony Hart, it shews a case in which a party would be precluded by such conduct from asserting an equity. Certainly it is a different thing, whether such conduct would give the adverse party an equity, so as to prevent the party so concealing his right, or apparently acquiescing in the nuisance, from asserting his title at law for compensation for the nuisance when effected. But there are two cases in which that has been done. I mean the cases of the watercourse, as reported in 2 *Equity Cases Abridged*, 522, and *Short v. Taylor*, decided in Lord Somers's time, there cited, Michaelmas, *Anon. MS. Rep.*, where injunctions were granted to stay actions for nuisances, because the plaintiff at law had encouraged them; that is the term used by the Court; and I think it is impossible, independent of those two cases, not to say, that a party may so encourage that which he afterwards complains of as a nuisance, as to preclude him not only from complaining of it in this

Court, but to give the adverse party a right to the interposition of the Court, in the event of putting himself in a position to complain of the nuisance at law. There is no fact before me to call for any opinion as to what degree of encouragement, or what circumstances leading to encouragement, would be sufficient for that purpose; but I think it is quite clear, that there is in this bill sufficient of allegation to make it competent for the plaintiff to give such evidence as would operate in raising an equity against the title at law, asserted by a party claiming compensation at law for a nuisance.

That being the state of the pleadings, and that being the state of the authorities, if I were to allow this demurrer, I should, of course, be understood as saying, and I should in fact be saying, that there was no case stated in the bill which could entitle the plaintiffs, if proved, to the interposition of the Court. Now, when I find that it has been decided that when a party encourages a nuisance, the other party is entitled to the jurisdiction of this Court, for the purpose of preventing the prosecution of an action complaining of it, and I find there is that on the face of the bill which may enable the plaintiffs to prove a case which will bring it within that jurisdiction, I cannot say that there is not a case stated which may, if properly supported by evidence, give that equity which is asserted. And that being the whole question which I have to consider, I certainly cannot think that this is a case in which I can say there is not a case stated which, if properly supported by evidence, may enable the plaintiffs to support the equity which he asserts. For those reasons, I think, the demurrer must be overruled. I can by no means say, that it is a very clear case; I think it is going as near the point as can be, because there is as little allegation in support of the equity as can well be conceived. There is a very general term used. My judgment proceeds on this—there is a term used which would enable the party to make a case, which, if proved, would entitle him to the interposition of the Court. However, I must confirm the Vice Chancellor's order, with costs.

(4) 2 Moll. 319.

L.C.
 Nov. 25, 1840. }
 Jan. 23; Feb. 1, } PYM v. LOCKYER.
 1841.

Legacy—Ademption.

A portion advanced to a child by a parent, or by a party standing in loco parentis, of a less amount than a provision made for such child by will, will not be an ademption of the testamentary provision altogether, but only pro tanto.

The judgment of the Vice Chancellor, when this cause came before his Honour, will be found reported in 8 *Law J. Rep.* (N.S.) Chanc. 362.

His Honour's judgment was appealed from, and

Mr. Wigram, Mr. G. Richards, and Mr. G. L. Russell, appeared for the appellants; *Mr. Jacob, Mr. Bethell, and Mr. Lowndes*, for the respondents.

Nov. 25, 1840.—The LORD CHANCELLOR.—This case involves much of the doctrine upon which I acted in *Ponys v. Mansfield* (1), and in so far as such doctrine shall be found applicable to the facts of this case, it must govern my decision. I have not seen any reason to doubt the accuracy of that doctrine, and shall consider it as the law of this Court, unless otherwise instructed by the authority of the House of Lords.

Edmund Lockyer, the testator, had two children, a son and daughter; a son Edmund, the interests of whose children are apportioned or vested in the appellants, and Eleanor Margaret, the daughter, who had three children, Edmund, Frederick, and Eleanor, the respondents. By the will of 1823, the testator bequeathed 5,000*l.* to trustees, upon trust, subject to an annuity of 40*l.* per annum for his daughter Eleanor Margaret for her life, to pay the interest for his grandson Frederick's maintenance, until twenty-one, then to him for life, and after his death to divide the principal equally among his children, that is to say, sons who should attain twenty-one, or die under that age, leaving children,

(1) 6 Sim. 528; a. c. 5 *Law J. Rep.* (N.S.) Chanc. 153; 3 *Myl. & Cr.* 359; 7 *Law J. Rep.* (N.S.) Chanc. 9.

and daughters attaining twenty-one or marriage, with maintenance in the meantime; and if there should be no such children, the 5,000*l.* was to fall into his residuary personal estate. Another legacy of 5,000*l.* was given to trustees, upon similar trusts, for the benefit of his grandson Edmund and his children. Another legacy of 6,000*l.* was given to trustees upon similar trusts, for the benefit of his granddaughter Eleanor and her children, her life estate to be enjoyed by her to her separate use: and the residue of his estate he gave equally between his six grandchildren, being children of his son and of his daughter. In 1831 the grandson Frederick married, and by his marriage settlement, to which the testator was a party, but to which Frederick's father was not a party, after reciting the marriage agreed upon, and that the testator, as the grandfather of Frederick, had agreed to invest a sufficient sum to purchase 2,000*l.* 3*l.* per cent. reduced annuities, upon the trusts and provisions after declared, and that such sum had accordingly been purchased in the names of trustees, the trusts were declared to be for Frederick for life, and after his death for the intended wife for life, and then to the children, as the father and mother, or the survivor, should appoint, or in default of appointment, equally, and in default of children, for Frederick absolutely. In the year 1831 Edmund married; and by the settlement on his marriage, to which, as in the former instance, the grandfather was, but the father was not a party, after reciting that upon the treaty for the said marriage, the said testator, the grandfather, had agreed, on the part of the grandson, to convey certain premises for the purposes after mentioned, and to execute a bond for securing 3,000*l.* to trustees, payable six months after his death, which sum was to be held by them upon the trusts of the settlement, the lands and premises were settled to the use of Edmund, the husband, for life, remainder to the wife for life, remainder to the children, as they or the survivor should appoint, and in default of appointment to the children equally, and in failure of children to Edmund in fee; and similar trusts are declared on the 3,000*l.*, which became due six months after the testator's death.

In 1831, the daughter Eleanor married. The Master's report states a long correspondence between the testator and grandfather, and the father of the intended husband, by which he, the testator, bound himself to lay out, in the name of trustees, 4,000*l.* in the public funds, the interest of which was to be paid to himself for life, and after his death to the husband and wife, or survivor, for life, then to their issue equally, and if no children, the principal to be subject to the wife's appointment; and he further agreed to pay to them 150*l.* per annum for the first three years, and 100*l.* a year afterwards, during his own life. Nothing further was done during the life of the testator, except he paid the 150*l.* per annum; and he died in 1836. In answer to an inquiry as to the manner in which the grandfather had acted towards the grandchildren, the Master found, from a statement of the father, that the three children had been maintained by him, the father, except that as to Frederick, his grandfather, being desirous he should go into the church, had agreed to pay his college expenses, and had paid the tutor's bills, and part, but not all, of his personal expenses; and that from the time of his ordination to that of his marriage he paid him 200*l.* a year, and after his marriage 100*l.* a year. As to Edmund, being desirous that he should be in the profession of the law, he paid the stamp on his admission, and the premium to the solicitor to whom he was articled, and some small sums as pocket-money; and after he had served his time, paid the costs of his admission as an attorney, and the fee to a conveyancer, and made him an allowance for his lodging and maintenance in London, but which was very inadequate for that purpose. As to the grand-daughter Eleanor, the testator did not defray any of the expenses of her maintenance or education up to the time of her marriage. That he held constant intercourse with all the grandchildren, making them presents of money and other gratuities, and directing and controuling them with an authority equal to that of a father; that he was referred to on the treaties of the respective marriages of the grandchildren, as the person whose consent was indispensably necessary, and as the principal party to the

pecuniary arrangements; that all such children lived at the same time in intimate and affectionate intercourse with their parents; and that the father was never, until their marriage, wholly exempt from the cost and maintenance of their support; and that on the marriage of Eleanor he agreed to make her an allowance of 50*l.* per annum, for three years, which he paid.

Upon this state of circumstances, as found by the Master's report, the Vice Chancellor, upon further directions, declared the provisions made by the testator upon the marriages of Frederick, Edmund, and Eleanor, were not ademption or satisfactions of their respective portions of 5,000*l.* and 6,000*l.*, by the will bequeathed for the benefit of them and their respective children. By the appeal, the propriety of this decision is challenged.

All the decisions, upon questions of double portions, depend upon the declared or presumed intention of the donor. The presumption in equity is against double portions; because it is thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, the repetition of it, in the second, should not be intended as an addition to the first; the second provision is intended to be, and is presumed to be intended as a substitution, and not as an addition to the first. When the gift is a mere bounty, there is no ground for raising any presumption of intention, as to its amount, though such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions, or as a mere gift; and upon this subject certain rules have been laid down, all intended to ascertain and work out the intention of the father. In the case of the parent, a legacy to a child is presumed to be intended to be a portion, because providing for the child is a duty which the relative situation of the parties imposes upon the parent. That duty which is imposed upon the parent, may be assumed by another, who, for any reason, thinks proper to place himself, in that respect, in the place of a parent. When that is so, the same presumption arises against his intending the first gift to take effect as

well as the second, because both, in such cases, are considered to be portions. Whether the donor had, for this purpose, assumed the office of a parent, so as to invest his gift with the character of a portion, may be proved by external evidence, such as the general conduct of the donor towards the children, or any internal evidence of the nature and terms of the gift. If the former be alone relied upon, it will prevail, though it will appear the donor did not assume all the duties of the parent, or effectually perform those he had undertaken, the question being merely, whether the facts proved fairly led to the conclusion, he intended to provide a portion for the children, and not merely to bestow a gift. Upon this point, *Powys v. Mansfield*, founded upon *Carver v. Bonles* (2) and many other cases, is conclusive. Such evidence of general conduct towards the child, is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments contained in the gifts, or in extrinsic circumstances; and, as part of such extrinsic circumstances, the general conduct of the donor towards the family, particularly towards the other children, may very properly be named in the consideration of his object and intention. It may be assumed, that the father of the three children had but slender, if any, means of making permanent provision for them, as on two of the three marriages in question he provided nothing, and in the third, he only agreed to pay 50*l.* per annum for three years; and the Master's report states, upon the authority of the father himself, that the grandfather directed and controuled the children with an authority equal to his own, and that he was referred to in the cases of the marriages, as the person whose consent was indispensably necessary, and as the principal party to the pecuniary arrangements.

Such being the position in which the grandfather had placed himself, with respect to these grandchildren, we find him by his will making provisions for them, and for the children of his son, not giving them certain legacies, of which they or others for them might hereafter regulate

the disposal, but taking upon himself to do so in anticipation of their marriages, settling the sums given so as best to provide for them and for their children. Upon the marriage of Frederick, the grandfather appears as the only contracting party on his side, as to provisions to be made; and the settlement recites, that he, as grandfather, had agreed to invest the sum alleged. Upon the marriage of Edmund, the same course was followed, though the same words were not used, but instead of investing the sum in the names of trustees, as was done on the marriage of Frederick, he entered into a bond to pay the sum agreed to be settled six months after his death. Upon the marriage of Eleanor, he first proposed to bind himself, and to leave the sum agreed upon by his will; but he agreed instead, in order to save the legacy duty to his family, to invest it with certain bankers, which he omitted to do. In all these arrangements, the sums given were settled or agreed to be settled as nearly as possible in the same way as he had provided by his will, which, in *Trimmer v. Bayne* (3), Lord Eldon seems to think, would of itself be sufficient to establish the character of a portion. That the sums so settled or agreed to be settled were portions in every sense of the word, cannot be doubted; and it is equally clear, that the corresponding sums in the will, though different in amount, are of the same character. From the necessities of the family, or from his own free choice, or probably from both, he assumed the task, and provided portions for the children, regarding in the distribution of his property, the number of those who stood in the same degree of relationship, and having similar claims upon him. This task so undertaken, he, in the first instance, proposes to carry into effect, by his will; but on the marriage of the children, he comes forward in some instances to perform, and in others to bind himself to perform, a part of what he had so assumed the office to do. In what respect, for the purpose of trying the intention of the donor, does this differ from the case of the parent? The father as well as the grandfather was at liberty to make what distribution he thought proper of

(2) 2 Russ. & Myl. 301; s. c. 9 Law J. Rep. Chanc. 91.

(3) 7 Ves. 516.

that property, but having once made the distribution, by distributing certain sums to each child, where is the probability, that on the marriage of the children, there should arise any intention of disturbing the previous scheme of distribution, and giving to such children the sum then settled, in addition to what had been before assigned as their portion, to the necessary prejudice of all the other children? It is to avoid such consequences, so little likely to be intended by the donor, that the presumption against double portions arises, which, though it may in some instances defeat the intention of the donor, is, in my opinion, calculated in general to effect it.

I am of opinion, that the grandfather has, as to the pecuniary provisions of the children of this family, put himself *in loco parentis*, and that the instruments themselves prove that the legacies and sums settled were intended as portions; therefore the presumption against double portions arises, and the several settlements or agreements on the marriage of the children operate as adempments of the legacies. In *Ex parte Pye* (4), Lord Eldon seems to allude to the possibility, that such second portions may be treated as adempments *pro tanto*. Such a limited application of the rule would, I think, in most cases, carry the intention of the testator completely into effect. I am not aware, however, of any case in which that has been acted upon; but in deference to the doubts suggested by Lord Eldon, and as the matter has not been argued upon that point, if counsel should think they can make anything of it, I should be glad to hear an argument upon that point only.

With respect to two of the portions, the testator, at the time of his death, was only under an obligation to pay. If the will had been made after the obligation had been incurred, the legacy would have been in satisfaction of the obligation; it would have been strange, had the will been of an earlier date, if the obligation would not have been an ademption. The order of the Vice Chancellor must be reversed, so far as it is inconsistent with this view of the case, and also with costs. In *Ex parte Pye*, Lord Eldon suggests a doubt on a

very important point. I have no doubt, in many cases, the rule gives double portions. But where 5,000*l.* has been given by a will, as a portion, the rule, as it stands in most of the cases, or in all of the cases, would I believe be, that though a much less sum is given on the marriage, it destroys the gift of the 5,000*l.* That appears to me probably to be very contrary to the intention of the donor. It is very natural he should not wish the party to have both, but he may consider the portion as a performance *pro tanto* of the intention. To say it destroys the larger gift, is, in all probability, as great prejudice to the child as it would be to consider that both portions are to be taken out of the estate. That is not so: all the authorities are the other way.

The Lord Chancellor having decided that the grandchildren were not entitled, both to the provisions made by the settlements and also to the legacies, the point was argued before his Lordship in January 1841, whether the settlements operated as adempments of the legacies altogether, or only *pro tanto*. The case stood over for judgment.

Feb. 1, 1841. — The LORD CHANCELLOR. — When, upon the first argument of this case, I came to the conclusion, that the testator had placed himself *in loco parentis*, and that the effect of the portions upon the provisions by the will, was therefore to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision if the rules generally received in the profession, and laid down in all the text books of authority, and apparently founded on the highest authority, were to regulate the decision as to this property. The rule to which I refer is, that "a portion advanced by a father to a child, will be a competent ademption of a legacy, though less than the testamentary portion;" that is the rule as laid down in the 1st vol. of *Roper*, p. 318. I could not but feel, that in the case before me, and in most others, the effect of the rule would be to defeat the intentions of the parent. A father, who makes his will, dividing his property among his children, must be supposed to have decided what,

(4) 18 Ves. 151.

under the then existing circumstances, ought to be the portion of each child, not with reference to the want of each child, but allotting to each a share of the whole, which, with reference to the wants of the whole, each ought to possess. If, subsequent to the marriage of any one of them, it becomes necessary or expedient to advance a portion for any such child, what reason is there for assuming that this advancement points out the amount which ought to be allotted? The advancement must necessarily be supposed to be of the particular child's portion as the rule assumes, as it precludes the child advanced from claiming the sum given by the will, as well as the sum advanced. So far the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of any child by an advancement, is not permitted to lessen or diminish the provisions made.

The supposed rule, that the larger legacy is to be adeemed by a smaller portion, appears not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive in most cases of the intention of the parent. Can it be assumed as a proposition so general, as to be the foundation of a rule of property, in the absence of any express intention, that the marriage of one child, and the advancing a portion to such child, foregoes the will of the father distributing his property among all his children, by taking from the portion given to that child, and in some extent adding to the provision of the others? Is it not, on the contrary, the usual course and practice, that the father, on the child's marriage, relaxes his strict hold over it as little as possible, reserving to himself the power of disposing of the residue of the fortune destined for such child, as future circumstances and situations may require? In doing so, the father is not influenced only by his natural love and affection, but adopts a course which he may be supposed to think most beneficial for such child. Where then is the ground of the presumption that he intended, by advancing part of what he had destined as the portion of that child, to deprive that child of the remainder? The argument in favour of the proposition, appears to me to be founded on tech-

nical reasoning as to the term "portion," without a due consideration of the sense in which it is used. The giving of a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and though the parent has by his will adjudged the amount of that moral debt to be a certain sum, he is supposed by the settlement to have departed from the opinion so formed and expressed, and substituted the amount settled instead of such provision. This, however, assumes the portion settled should be intended as a substitution of the former gift by the will, and such intention, if proved, would remove all doubt; but the question is, whether such intention is to be presumed in the absence of all proof. Is it not much more reasonable to suppose, that the intention as to the amount of the portion is to be the same, and the sum settled is only an ademption of part of what the will declares to be the intended amount to be given? There is no reason for supposing the sum advanced to be the whole portion intended for the child. Assuming it to be a substitution for the whole, the effect of the portions advanced by a parent upon a legacy before given, is called an ademption; but, if the principle of ademption be applied to those cases, the consequences now under consideration will not follow. The gift or alienation of part of what constituted a specific legacy, will not destroy the legacy as to what remains, as the admitted exceptions to the general rule do not seem consistent with the existence of that part of it now under consideration. The rule is said not to apply, when the testamentary portion and subsequent advance are not *ejusdem generis*. This may be very reasonable, as indicative of the intention; but it is not easy to discover, why it is to be an ademption of the legacy. A gift of stock in trade of 1,500*l.* is not to be an ademption of a legacy of 500*l.*, which, in the case of *Holmes v. Holmes* (5), it was held not to be. So a testamentary gift of the residue, or part of the residue, is said not to be adeemed by a subsequent advancement, because the amount was uncertain; but in that case the child, if sole residuary legatee,

takes the advancement as part of what it would have, if no such advancement had been made, as residue. The gift under the will operates, though diminished by the amount of the advancement.

The Statute of Distributions, the custom of London and York, and the whole doctrine of hotchpot, proceed upon the principle, that advancement by a parent operates only as part satisfaction of what the child would otherwise have been entitled to, the object being to produce equality, not (according to the rule contended for,) inequality between the children. It appears to me, therefore, that all reason and all analogy is against the supposed rule.

It remains to be examined, whether the authorities are such as to make it my duty to act upon it, and I cannot but express the satisfaction I have felt, at having had the cases so thoroughly examined; and I think the profession and the public are much indebted to those, whose industry and ability have brought the real state of this question so satisfactorily before me.

Hoskins v. Hoskins (6) is a case in which a smaller sum advanced, was held to be an ademption *pro tanto* of a larger legacy; but it does not appear, whether the decision proceeded on the evidence of intention.

Hartop v. Whitmore (7) is a very important case, being one generally referred to in support of the supposed rule, which, if the report in *P. Wms.* had been correct, it never would have been as there reported. It is a case of a legacy of 300*l.* adeemed by an advancement of 200*l.* From Mr. Cox's notes to *P. Wms.*, and the reports of *Prec. in Chancery*, and the extract from the registrar's book, it appears, that the whole statement of the facts in *P. Wms.* is erroneous. There, there was a legacy of 300*l.* in one event, and 200*l.* in another event, and an advance of 200*l.*; it was held, the event upon which the 300*l.* legacy was to be paid, never arose, and that the 200*l.*, the event to give which did arise, had been adeemed or satisfied by the 200*l.* advanced.

Norton v. Norton, cited in a note to *Pusey v. Desbourie* (8) was cited, but that case appears to refer to advancements under the custom of London.

The case of *Fry v. Porter* (9) only proves, the supposed rule was never applied to devisees of real estate. The case is principally valuable as shewing, though only from the argument of counsel, that the supposed rule does not appear to have been heard of in 1716. The counsel are reported to have said, "Suppose a father by his will gives his daughter 10,000*l.*, and afterwards marries her, and gives her 5,000*l.* for her portion, and then dies without revoking his will: this is clearly not a revocation of the whole devise of 10,000*l.*, but only revocation or satisfaction *pro tanto*, viz. 5,000*l.*, and she shall take the other 5,000*l.* by the will; this is a plain case, and the same in reason as the present case."

In *Farnham v. Phillips* (10), the decision turned on the legacy being a residue, but that never appeared. "Where a father, after making a will, advances a child with a portion as great or greater than the legacy given by the will, such provision has always been held an ademption." The dicta of Judges upon matters not argued directly before them, have had an importance attached to them greater than in my opinion they ought; but such expressions falling from such a man as Lord Hardwicke, may safely be relied upon, as shewing that at that time a larger legacy being adeemed by a smaller one, was not familiar in his mind. It is more important to keep this dictum of Lord Hardwicke's in mind, because another dictum of that learned Judge in *Shudal v. Jekyll* (11), is relied upon in support of that supposed rule. The case itself has no application to the point now under consideration, the decision having turned on this, that the testator did not stand *in loco parentis*. Lord Hardwicke is reported to have said, "This Court, to be sure, leans strongly against double portions or double provisions, and whether the portion given in the lifetime is less or not, is no ways material." Lord Hardwicke may have meant, that so far as the portions are double, that is, the one a repetition of the other, only one shall prevail, and that it is not material whether such repetition be as to part, or as to the whole of the legacy, which would make

(6) *Prec. in Ch.* 263.

(7) *Ibid.* 541; s. c. 1 *P. Wms.* 681.

(8) 3 *P. Wms.* 316.

(9) 8 *Vin. Abr.* 154.

(10) 2 *Atk.* 215.

(11) *Ibid.* 516.

this dictum consistent with the former. But assuming the obvious meaning of the words is to recognize the supposed rule, the effect will be removed, by the fact of the erroneous report of *Hartop v. Whitmore* having been cited, and the point not having been the subject of discussion. Lord Hardwicke may naturally at the moment have assumed the report was a correct explanation. A dictum under such circumstances could have no weight against a contrary opinion expressed only a few months before.

The case of *Rosewell v. Bennett* (12) is a decision only as to the admissibility of evidence. Lord Hardwicke's observation shews, he considered the 300*l.* legacy and 200*l.* advanced, as intended for the same purpose, which places this case in that class which had decided, that even when the testator is a stranger, the advance of money, for the purpose for which the legacy was given, operates as an ademption.

In *Roper's Book*, vol. 1, p. 319, this case of *Rosewell v. Bennet* is cited in support of that proposition. It is also to be observed, if the 200*l.* advanced, had *per se* raised the presumption of an intention to revoke the 300*l.* legacy, the evidence tendered would have been useless to fortify the presumption, as there does not appear to have been any evidence offered to repel it.

Clarke v. Burgoine (13) is another case generally relied on in support of the supposed rule. As reported in *Dickens*, it would be a strong authority for the purpose, for it is there represented, that Lord Camden decided, that an advancement of 6,000*l.* was an ademption of two legacies of 3,500*l.* each, but on reference to the case itself, as extracted from the Registrar's book, a copy of which I have been furnished with, it appears, instead of there having been two legacies of 3,500*l.*, there were three legacies, one of 2,000*l.*, one of 500*l.*, and one of 1,000*l.*, making together only 3,500*l.*, so that this case does not bear upon the present question. It seems therefore, that the only two cases in which it appears that smaller advancements have been held to be an ademption of a larger legacy, that is, *Hartop v. Whitmore* and

Clark v. Burgoine, are inaccurately reported, and that in neither of them did the facts exist to raise any such question.

In *Grave v. Salisbury* (14), the point decided was different. The Attorney General, in arguing the ademption, only contended that the provision by a father to a child—whatever the provision was—that “any sum of money advanced, was in satisfaction of so much of the legacy.”

The case of *Powel v. Cleaver* (15) was not decided upon any point applicable to the present case, but the doctrine in question was much discussed, and Lord Thurlow, in one part of his observations, supposes a possible case of a legacy of 6,000*l.* being adeemed by an advancement of 5,000*l.*, but not upon the untenable ground that 5,000*l.* *in præsentis* was equally valuable with 6,000*l.* under the will of a living man, assuming that advancement must be of equal value with the legacy; but this the supposed rule would repudiate, as it is not thought to regard the relative value of a legacy, and an advancement paid, both being in the nature of portions.

In *Robinson v. Whitley* (16), the legacy was 1,000*l.*, and the sum advanced 500*l.* Sir William Grant thought the presumption was altogether rebutted by the evidence, but the counsel who argued in support of the ademption, only contended, “an advancement by a father to a child, to whom a legacy has been given by a previous will, is considered *prima facie* an advancement *pro tanto* of what was given by the will.”

In *Monck v. Monck* (17), the sum advanced was 4,000*l.*, and the legacy was 5,000*l.*, and Lord Manners said, that the 4,000*l.* was certainly a satisfaction *pro tanto* of the 5,000*l.*; but he dismissed the bill, because it was proved another sum of 1,000*l.* had previously been paid to the legatee in part of the 5,000*l.*

There appears to have been two cases in which the question came under the consideration of Lord Eldon, *Trimmer v. Bayne* and *Ex parte Pye* (18), but in neither was there any decision upon it. In the former, the legacy and provision were equal; in the latter, the legacy was 4,000*l.*, and the ad-

(14) 1 Bro. C.C. 425.

(15) 2 Bro. C.C. 499.

(16) 9 Ves. 577.

(17) 1 Ball & Bea. 298.

(18) 18 Ves. 147.

(12) 3 Atk. 77.

(13) Dick. 353.

vancement 8,000*l.* All that was contended for was, that the 3,000*l.* was to be considered as an advancement in part satisfaction of the legacy of 4,000*l.* Lord Eldon decided that advancement was not in satisfaction of the legacy, upon grounds which have no application to the present question. The case, therefore, is important only from the observations which fell from Lord Eldon; and it is not easy to determine on which side they preponderate. He says, "I recollect, that Lord Thurlow in the case of *Grave v. Salisbury*, remarked, that if a portion is given to a child by will or a gift so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *primâ facie* an ademption of the whole or *pro tanto*." He afterwards says, "It is the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part:" the meaning of which, I understand to be, that if the advancement be equal to the legacy, it is a total ademption, if less, *pro tanto* only; and he immediately proceeds to state some cases to have gone the length of holding, that a portion, though much less than the legacy, had been held to be an ademption of the whole. As the only cases in which this appears to have been decided, are those of *Hartop v. Whitmore* and *Clark v. Burgoine*, Lord Eldon must be presumed to have referred to them, or been speaking from general recollection of what appears to have been decided by them; and if so, the expressions used can be accounted for; but all the importance of that which fell from Lord Eldon, will be removed, from the fact of those cases being inaccurately reported, and in neither of them the doctrine can be supposed to be established.

The result of a careful examination of all the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported on principle, and is in its operation generally destructive of the interests that the parents have intended for their children, I think it my duty, notwithstanding the manner in which it has

been received in the profession, to decline adopting or following it; and, therefore, I declare that the advancements on the respective marriages in this case, are to be taken as ademptions *pro tanto* only of the legacies before given.

V.C. }
Jan. 16. } DOBEDE v. EDWARDS.

Practice.—Motion of course—Notice—Dismissal of Bill.

Where a plaintiff has liberty to amend his bill, and in default of amendment within a certain time, the bill is to stand dismissed, with costs; it is after that time a motion of course, not requiring notice, that the bill shall be dismissed.

The Court having ordered that the plaintiff should have liberty to amend his bill, and in default of amendment within a month, that the bill should stand dismissed, with costs; and the bill not being amended within that time, an order was made, upon motion, without notice to the plaintiff, that the bill should be dismissed, with costs.

The registrar suggesting that the order could not regularly be made upon a motion *ex parte*,—

Mr. Tennant, on behalf of the defendant, moved, without notice, that the bill might be dismissed, with costs, on the allegation that no amendment had been made within the time limited. He cited—

Stuart v. Worrall, 1 Bro. C.C. 581.

Seton on Decrees, p. 147.

The VICE CHANCELLOR directed the order to be made without notice of the motion, and said, that by the 17th amended order (1), where provision was made for the steps which should be taken by the plaintiff after replication, it was ordered, "If the plaintiff should make default herein, then, upon application by the defendant upon *notice of motion*, the plaintiff's bill shall stand dismissed," &c.; and the express addition of the words, "notice of motion," appeared to intimate, that without that provision, as in this case, the order would be of course, without notice.

(1) See 1 Law J. Rep. (N.S.) Chanc. 1.

V.C. }
Jan. 15. } GORST v. LOWNDES.

Time, Computation of—Title to Dividends of Stock.

The testator directed that the income of his property, for twenty-one years from his death, should be laid out in the purchase of real estate, and accumulated, and the same should then be held upon certain trusts. He died on the 5th of January 1820. The dividends on a sum of stock became due on the 5th of January 1841:—Held, that the latter day was included in the term of twenty-one years, and that the dividends due on that day formed a part of the accumulation fund.

R. Lowndes devised and bequeathed the whole of the residue of his real and personal estate to trustees, their heirs and assigns, upon trust, to receive the income thereof for the term of twenty-one years from his death, and after certain deductions thereout to accumulate such income, and lay the same out in the purchase of other real estates, and at the expiration of the term of twenty-one years to convey all the said real estates to the use of the first and other sons of T. Lowndes, his son, successively in tail male, and in default of such issue, or if such shall not be *in esse*, to the use of the testator's said son T. Lowndes, for life, remainder to the use of the testator's great-nephew T. Gorst for life, with remainder to his first and other sons in tail male, with remainder over. The testator died at two o'clock, p.m., on the 5th of January 1820; and T. Lowndes, the testator's son, died in 1840, without issue.

Among other sums standing in the name of the trustees was the sum of 184,000*l.* consols, and on the 5th of January 1841 a half-year's dividend became due thereon. The petitioner, the first tenant for life under the trust, prayed that he might be declared to be entitled to this dividend, on the ground that the term for accumulation ceased on the 4th of January 1841.

Mr. Jacob and Mr. Ellison for the petition.—One day must be taken to be inclusive, and the other exclusive, in computation of time. A person is of age on the day preceding the twenty-first anniversary of his birth.

NEW SERIES, X.—CHANC.

Toder v. Sansam, 1 Bro. P.C. 468.
Pugh v. the Duke of Leeds, Cowp. 714.
Lester v. Garland, 15 Ves. 248.
Ex parte Farquhar, 1 Mont. & M'Ar. 7.
Godson v. Sanctuary, 4 B. & Ad. 255;
s. c. 2 Law J. Rep. (N.S.) K.B. 19.
Ex parte Whitby, 1 Mont. & Chit. 571;
s. c. 8 Law J. Rep. (N.S.) Bankr. 55.
Pellw v. the Inhabitants of Wonford,
9 B. & C. 134; s. c. 7 Law J. Rep.
M.C. 84.
Hardy v. Ryle, 9 B. & C. 603; s. c. 7
Law J. Rep. M.C. 118.
Blunt v. Heslop, 8 Ad. & El. 577; s. c.
7 Law J. Rep. (N.S.) Q.B. 216.
The Queen v. Brownlow, 11 Ad. & El.
119; s. c. 9 Law J. Rep. (N.S.) M.C.
15.
Stat. 25 Geo. 2. c. 27. s. 4 (1).

Mr. Wigram and Mr. L. Lowndes, contra, cited *Ackland v. Lutley* (2).

Mr. K. Bruce and Mr. G. Richards appeared for other parties.

The VICE CHANCELLOR.—I should have thought this a very simple point. I have always understood the rule to be, that if a party creates a term from a particular day, that day is excluded in the computation of the term. Here, under the ex-

(1) This is one of the acts for consolidating the public funds, and it corresponds in form with the subsequent acts. It enacts, that the annuities therein mentioned "shall be issued and paid half-yearly, on the 5th day of January and the 5th day of July in every year," out of the funds thereby charged therewith; "and the Commissioners of the Treasury, or any three or more of them now being, or the High Treasurer or Commissioners of the Treasury of his Majesty, his heirs or successors for the time being, without any further or other warrant to be sued for, had or obtained in that behalf, shall and may from time to time issue the same at the respective half-yearly or other days of payment, whereon the same shall become due and payable at the said receipt of Exchequer, to the first or chief cashier or cashiers of the Governor and Company of the Bank of England, and their successors for the time being, by way of imprest and upon account, for the purposes above mentioned; and that all and every such cashier or cashiers, to whom the said money shall from time to time be issued, shall, without delay, apply and pay the same accordingly, and render his account thereof, according to the due course of the Exchequer."

(2) 9 Ad. & El. 879; s. c. 8 Law J. Rep. (N.S.) Q.B. 164.

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costs (2), as directed by the General Orders of May 10, 1839 (3). He suggested, that it might be more beneficial to the charity, to allow the defendant the interest on his costs, than to create an incumbrance upon the estate for the purpose of immediately paying them, to which, he submitted, the defendant would otherwise be entitled.

The VICE CHANCELLOR said, that the registrar had mentioned to him the application which had been made by the parties, to have a direction for allowing interest on the costs inserted in the decree; and that he was of opinion no such direction ought to be inserted. His Honour said, that the statute seemed to regulate only the manner of recovering interest on costs not paid, as between one party and another, and did not contemplate the case of costs ordered to be paid out of an estate.

His Honour permitted a reference to be taken, directing the Master to inquire as to the most fit and proper mode of raising the costs due to the defendant, either by sale or mortgage, and to approve of such proceeding accordingly.

V.C. }
Jan. 29. } WARD v. BARTON.

Pleading—Foreclosure of Leaseholds—Letters of Administration—Costs.

On a decree for foreclosure of leaseholds, against the representative of the mortgagor, directions will not be given to allow the mortgagee, in his account, the costs of proceedings taken in the Ecclesiastical Court to procure representation, unless the fact of

(2) We command you, that of the goods and chattels of —, in your bailiwick, you cause to be made the sum of £— for certain costs, which were lately before us in our High Court of Chancery, in a certain cause, &c. by a decree of our said Court, bearing date —, decreed to be paid by the said — to —, and which costs have been taxed and allowed by, &c. at the sum of £—, as appears by the certificate of the said, &c. dated —. And that of the goods and chattels of the said —, in your bailiwick, you further cause to be made interest on the said sum of £— at the rate of 4l. per cent. per annum from the [date of the Master's certificate], and that you have that money and interest before us, &c.

(3) 8 Law J. Rep. (N.S.) Chanc. 274.

such proceedings having been taken is stated on the bill.

This was a suit by the mortgagee of leaseholds, for foreclosure. The mortgagor died, and no person having obtained letters of administration of the estate, the mortgagee took proceedings in the Ecclesiastical Court, and cited the next-of-kin; whereupon the brother of the deceased appeared, and took out letters of administration. The mortgagee then filed a bill of foreclosure, but did not on his bill state the proceedings, which had been had in the Ecclesiastical Court. On the cause coming on to be heard—

Mr. E. Teed, for the plaintiff, asked for a direction in the decree, that the costs he had incurred in the Ecclesiastical Court might be allowed him, in taking the account of what was due; or that he might be at liberty to present a petition, stating the proceedings which it had been necessary to take in procuring the representation; inasmuch as the costs thereby incurred would not, without some special directions, be allowed on taxation—*Hunt v. Fownes*, 9 Ves. 70.

Mr. Cockrell, for the defendant, the personal representative of the mortgagor.

The VICE CHANCELLOR. — These facts occurred, and were known before the institution of the suit, and therefore might have been stated in this bill. In the case cited, the mortgagor died after the commencement of the suit. The plaintiff is only entitled to the common decree.

V.C. }
Jan. 26, 28, 30. } SMITH v. CLEASBY.

Practice.—Injunction, Motion to dissolve—Admissibility of Affidavits.

A special injunction having been obtained ex parte, against one of several defendants, that defendant put in his answer, and then gave notice of motion to dissolve the injunction. Exceptions were afterwards taken to the answer and submitted to; and before the further answer was put in, the plaintiffs filed other affidavits in support of the injunction:—Held, that these affidavits were admissible on the motion to dissolve, of which notice had

been given before the matter of the exceptions was answered.

The bill was filed, and a special injunction immediately obtained *ex parte*, restraining the defendant Cleasby from suing out a fiat in bankruptcy against the plaintiffs. The answer of Cleasby was filed on the 9th of January, and notice of motion to dissolve the injunction was served on the 14th of January. Exceptions were taken to the answers, and were submitted to, and on the 26th of January, a further answer was put in. The further answer was by mistake entitled "The further answer of A. B. to the bill of complaint of J. S. and W. Jane. The plaintiffs were J. S. and W. Fenn. The error in the title of the answer being discovered, an attempt was made to file a correct answer, but the six clerk refused to file it while the other answers remained upon the file. The plaintiffs gave notice of motion to take the further answer off the file. On the part of the defendant it was moved, at the same time, that the answer being amended and re-sworn, the six clerk do now receive and file it.

Mr. K. Bruce, for the plaintiffs.

Mr. G. Richards, for the defendant.

Griffiths v. Wood, 11 Ves. 62.

The VICE CHANCELLOR made the orders on both motions; on the first, upon the affidavit of service, the defendant not appearing on that motion; and, on the second, *ex parte*.

During the interval, after the time when the exceptions to the answer were delivered, and before the time when the further answer was filed, the plaintiffs filed further affidavits in support of the injunction, and in opposition to the notice of motion which had been given to dissolve it. The answers of the other defendants had not been filed when the motion to dissolve came on to be heard.

The further affidavits, being then tendered, were objected to.

Mr. K. Bruce and *Mr. Cankrien*, in support of the right to read the affidavits, argued, first, that the co-defendants had not answered; and that the plaintiffs were entitled to the answers of all the parties.

Kershaw v. Matthews, 1 Russ. 361; s. c. 4 Law J. Rep. Chanc. 155.

Atkinson v. Kemble, 7 Sim. 638.

Secondly, that an insufficient answer was no answer. To exclude affidavits being read against an answer, it must be a full answer, binding and conclusive as a record against the defendant; this proposition, although new in specie, is old in principle—

Gregor v. Lord Arundel, 8 Ves. 87.

Turner v. Turner, 1 Dick. 316.

Attorney General v. Young, 3 Ves. 209.

Lord Eldon was in the habit of looking at an answer, in order to judge whether it was sufficient.

Mr. Richards and *Mr. James Parker*, contrà.—Affidavits can be read against an answer only in certain cases, such as verifying documents not admitted or denied by the answer, or in cases of waste. First, Cleasby is the only defendant enjoined; the answers of the co-defendants can neither be read in his favour nor against him. Were the rule of practice otherwise, a friendly defendant might, by not putting in his answer, prevent a co-defendant from procuring the injunction to be dissolved, except under the peril of encountering new affidavits of the plaintiff. In *Kershaw v. Matthews*, two defendants (partners) were enjoined; the answer of both might well be considered as necessary to constitute a sufficient answer by either of them.

Smythe v. Smythe, 1 Swanst. 252.

Norway v. Rowe, 19 Ves. 143.

A reference to the first answer and to the exceptions, will shew that the latter are of a most frivolous nature.

The VICE CHANCELLOR.—I have had an opportunity of considering this point more than is frequently afforded me, and my opinion is, that the way in which the defendant (Cleasby) has thought proper to manage the matter, renders it imperative on me that I should receive these affidavits. The defendant did this: he put in his answer on the 9th of January; on the 14th, he gave the notice of motion to dissolve. He need not have given that notice of motion to dissolve; he might have waited until he had seen whether the plaintiffs would or not except to that answer, which he must have known at the time was an insufficient answer, and to which he might reasonably have

expected exceptions would be filed. I say so merely because, as soon as the exceptions were filed, he submitted to them. When, therefore, the defendant had filed an imperfect answer, he thinks proper, while it is in an imperfect state, to give the notice of motion. If, however, he had withdrawn it, and had served a second notice of motion, after he had satisfied the exception, by putting in a full answer, then I apprehend further affidavits could not be received; but I am now to decide on that notice of motion, which he served at a time his answer was imperfect. And it appears to me, that the circumstance which was stated in argument—namely, that my Lord Eldon would look through the answer, to see if it was an imperfect answer, though not exactly this case, yet it is an acknowledgment of the principle on which I proceed—namely, that the thing which does appear to be an imperfect answer, and which, to a certain extent, I must judicially take to be an imperfect answer, was only an affidavit, and against which affidavits might be filed; and my opinion is, that for the purpose of hearing this notice of motion, I am at liberty to receive the affidavits.

V.C. }
Feb. 16, 24. } JONES v. WINWOOD.

Power of Appointment—Execution—Insolvent.

An estate was settled to such uses as M. and N. his wife, should jointly appoint, and in default of appointment, to the use of the husband for life, remainder to trustees for his life, to preserve, &c., remainder to the use of the wife for her life, remainder to the use of trustees for her life, to preserve, &c., remainder to the use of the first and other sons of M. & N. his wife, successively in tail general, remainder to the use of the daughters, as tenants in common in tail general, with cross remainders in tail, and remainder to the use of the husband in fee. The husband took the benefit of the Insolvent Debtors Act, and made the usual conveyance of all his estate to the provisional assignee. Afterwards, the husband and wife, purporting to execute their joint power, appointed the estate in fee to trustees for sale:—Held, that the power of appointment in the settlement, was not extinguished

by the conveyance to the provisional assignee; and that the appointment to the trustees, vested in them the entire inheritance in fee simple, of the estate, excepting so much thereof as was already vested in the provisional assignee.

The authority of *Badham v. Mee*, 7 Bing. 695; s. c. 1 Myl. & K. 32; 9 Law J. Rep. C.P. 213; 2 Law J. Rep. (N.S.) Chanc. 4, *questioned*.

This was a bill for specific performance of an agreement for the sale of an estate situated in the parish of Kilie Ayson, in the county of Cardigan.

By articles of the 15th of November 1833, made between Isaac Jones, P. Brown, and W. T. Davies of the one part, and H. Q. Winwood of the other part, they, the said Jones, Davies, and Brown, each of them according to their several and respective estates and interests in the premises, agreed to sell the same premises for the consideration therein mentioned, and the said H. Q. Winwood agreed to purchase and take the same, and the inheritance thereof respectively, free from incumbrances. H. Q. Winwood assigned the benefit of the articles to the defendant J. Winwood. The purchaser objecting to the title, on the ground of the alleged invalidity of an indenture made in September 1828, as an exercise of a power of appointment by W. T. Davies, the suit was instituted by agreement between the parties, whereby the purchaser agreed to take no other objection to the title, and to pay the costs of the suit in any event. The cause was heard before the Lord Chancellor in April 1837, when it was ordered that the following case should be sent for the opinion of the Barons of the Exchequer:—

By indentures of lease and release, bearing date respectively, the 27th and 28th of December 1819, the release being made between T. H. Jones of the first part, W. Davies and Alice, his wife, of the second part, W. T. Davies of the third part, W. Williams of the fourth part, Evan Davies of the fifth part, W. Lewis of the sixth part, and J. L. Williams of the seventh part, and by a fine and recovery, levied and suffered in pursuance of the said indenture, a certain, &c. [parcels], in the

said county of Cardigan, were settled, after certain uses which have determined, to such uses, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner, and subject to such powers of revocation and new appointment, and other powers, provisoes, declarations, limitations, and agreements, as the said W. T. Davies and Frances his wife, should at any time or times, and from time to time during their joint natural lives, by any deed or deeds, instrument or instruments in writing, to be by them jointly sealed and delivered in the presence of, and attested by two or more credible witnesses, direct, limit, or appoint, and in default of, and until such direction, limitation, or appointment, or in case any such should be made, then subject thereto, and when and as the estate or estates, interest or interests thereby directed and appointed, limited or created, should respectively end and determine, and in the meantime, subject thereto, and as to such part or parts of the same premises, and all such estate and interest therein, of which no such direction, limitation, or appointment should be effectually made as aforesaid, to the use of the said W. T. Davies, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determining of that estate by forfeiture or otherwise, in his lifetime, to the use and behoof of the said Evan Davies, and his heirs, for and during the natural life of the said W. T. Davies, upon trust to preserve the contingent remainders hereinafter limited, from being defeated or destroyed, and from and immediately after the decease of the said W. T. Davies, to the use of Frances Davies, the wife of the said W. T. Davies, and her assigns, for and during the term of her natural life; and from and immediately after the determining of that estate by forfeiture or otherwise, in her lifetime, to the use and behoof of the said Evan Davies and his heirs during the lifetime of the said Frances Davies, in trust to preserve the contingent remainders hereinafter limited, from being defeated or destroyed, and from and immediately after the decease of the survivor of them, the said W. T. Davies and Frances his wife, to the use of the first son of the

body of the said W. T. Davies upon the body of the said Frances, his wife, lawfully begotten or to be begotten in tail general, with remainder to the use of the second, third, fourth, and all and every other son and sons of the body of the said W. T. Davies, upon the body of the said Frances, his wife, lawfully begotten or to be begotten, successively in tail general, with remainder to the use of all and every the daughter or daughters of the said W. T. Davies, upon the body of the said Frances, his wife, lawfully begotten or to be begotten, as tenants in common in tail general, with cross remainders between and amongst the same daughters respectively, with remainder to the use of the said W. T. Davies, his heirs and assigns for ever. By indentures of lease, dated March 1823, the said premises were limited and appointed to J. Herbert, by way of mortgage, to secure the sum of 1,400*l.* and interest. In August 1824, W. T. Davies took the benefit of the Act for the Relief of Insolvent Debtors; and by an indenture of the 6th of August 1824, all the estate, right, title, and interest of the said W. T. Davies to all his real and personal estate and effects in possession, reversion, remainder, or expectancy, were conveyed and assigned to the provisional assignee, his successors and assigns. By an indenture of the 8th of April 1825, the provisional assignee conveyed and assigned all the said real and personal estate and effects to Isaac Jones, his heirs, executors, and administrators and assigns, in trust for the creditors against whose demands the said insolvent had been discharged by the order of the Court, and for such other uses as were in the said act expressed. By indentures of lease and release and appointment, bearing date the 16th and 17th days of September 1828, and made between the said W. T. Davies and Frances his wife, of the one part, and P. Brown and J. Beynon (who disclaimed) of the other part, the said premises, among others, were by the said W. T. Davies and Frances his wife, in pursuance and in exercise of the power of appointment, to them reserved or given by the indenture of release of the 28th of December 1819, and of the fine and recovery suffered in pursuance thereof, and of all and every power and powers

enabling them in that behalf, directed, limited, and appointed, granted, bargained, sold, aliened, released, and confirmed unto the said P. Brown and the said J. Beynon, their heirs and assigns, to hold the same unto them, and the survivor of them, and the heirs and assigns of such survivor, upon trust to sell and dispose of the said hereditaments and premises, and to apply the monies arising therefrom in discharge of the debts of the said W. T. Davies, and upon other trusts therein mentioned.

The questions were, first, whether the power of appointment contained in the said indenture of release of the 28th of December 1819, was or was not destroyed by the said conveyance, bearing date the 6th of August 1824, by the insolvent W. T. Davies, of all his estate to the provisional assignee; and secondly, if the power was not destroyed, what estate passed under the appointment made by the indenture of the 17th of September 1828.

The case was argued before the Court of Exchequer, and the reasons of the opinion of the Barons of that Court were returned with the certificate (1).

The certificate was as follows:—

“We have heard this case argued by counsel, and have considered it, and are of opinion, first, that the power of appointment contained in the indenture of release of the 28th of December 1819, was not destroyed by the conveyance, bearing date the 6th of August 1824, by the insolvent W. T. Davies, of all his estate to the provisional assignee; and secondly, that by the indenture of the 17th of September 1828, an estate in fee simple was conveyed to the trustees therein named, subject, however, to the estate for the life of the insolvent, and (on failure of the intermediate estates) to the remainder in fee to the insolvent, which had been prior thereto conveyed to the assignees of the insolvent's estate.

“ABINGER.

“J. PARKE.

“W. BOLLAND.

“E. H. ALDERSON.”

On the hearing of the cause on the equity reserved,—

(1) For the reasons of the opinion given by the Court of Exchequer, see 3 Mee. & Wels. 653; s.c. 7 Law J. Rep. (N.S.) Exch. 225.

Mr. Wigram, Mr. G. Richards, and Mr. Walford, for the plaintiff, submitted that, notwithstanding the doubtful nature of the question, the purchaser having consented to a case, was bound to complete the purchase, if the Court should confirm the certificate.

Mr. K. Bruce, Mr. Jacob, and Mr. Rudall, for the defendant, the purchaser.—The joint power of appointment vested in Davies and his wife, was extinguished by the assignment to the provisional assignee.

Badham v. Mee, 7 Bing. 695; s. c. 1

Myl. & K. 32; 9 Law J. Rep. C.P.

213; 2 Law J. Rep. (N.S.) Chanc. 4.

Hole v. Escott, 2 Keen, 444; s. c. 4

Myl. & Cr. 187; 6 Law J. Rep.

(N.S.) Chanc. 355; 8 Law J. Rep.

(N.S.) Chanc. 83.

The deed of September 1828 attempts moreover to create a base fee, with a remainder over, which is an interest that cannot be barred, and is illegal.

The vendors are trustees for different classes of creditors, without any ascertained rule for the application of the purchase-money between them; and without any principle to determine, by whom the receipt for the purchase-money is to be given.

Sharp v. Adcock, 4 Russ. 374.

Willcox v. Bellaers, Turn. & Russ. 491.

Doe d. Coleman v. Britain, 2 B. & Ald. 93.

Edwards v. Slater, Hard. 410.

Albany's case, 1 Rep. 111.

Co. Lit. 265, a.

3 & 4 Will. 4. c. 74. s. 19.

1 Sugd. Pow. 44, 45, 72.

Rattle v. Popham, 2 Stra. 992.

THE VICE CHANCELLOR.—The first question before me is, whether the certificate of the learned Judges of the Court of Exchequer shall be confirmed. I am clearly of opinion, that it ought to be confirmed. They have thought fit to give the reasons for their opinion, and with those reasons I, in substance, coincide.

It is impossible to read the report of *Badham v. Mee*, without supposing that the ground upon which the Judges of the Court of Common Pleas, in 1831, rested their opinion, was really that which Sir J. Leach, according to the report of it in 1 *Mylne & Keen*, 54, assumed to be their

ground for giving the certificate, and made his ground for continuing it in 1832. That ground plainly admitted, that notwithstanding the bankruptcy of R. Mee, his power of appointment among his sons subsisted, as unquestionably it did, subject only to this restriction, that he could not exercise it to the prejudice of his assignees, who were entitled to the fee in remainder, after the estates in tail general, limited to the sons in succession. That remainder in fee, the assignees took under the limitation, in default of, and subject to any appointment under the power, whether any prior estate tail might or might not be enlarged into a base fee. Moreover, the bankrupt, Richard Mee, did not, in execution of his power, appoint a base fee, so as to give ground for the objection that Sir J. Leach assumed. But the bankrupt appointed in fee simple to his son, and the law provided that the appointment should not affect the remainder in fee, which the assignees had previously acquired by virtue of the limitation in default of appointment. The remainder in fee, therefore, which the assignees took at first, continued in them unaffected by the exercise of the power.

The case of *Thorpe v. Goodall* (2), and the act 6 Geo. 4. c. 16. ss. 65, 77, prove that even in a case where a bankrupt, but for the execution of a power by him, would be tenant in tail, the power as well as the estate tail is vested in the assignees.

In the present case, subject to the joint power of appointment given to the husband and wife, the estate for life, and the ultimate remainder in fee limited to the husband passed, under the indentures of the 6th of August 1824 and the 18th of April 1825, to Isaac Jones, the insolvent's assignee; and the appointment of September 1828, was an appointment in fee, which, by operation of law, vested the whole inheritance in fee simple in Brown and Beynon, except only that portion of it which was already vested in Isaac Jones, and which by law could not be affected by the appointment. The whole inheritance, except that portion, was then vested in the trustee to preserve contingent remainders in the wife for her life, and comprehend the contingent remainders to the children.

(2) 17 Ves. 388, 460; s. c. 1 Rose, 40, 270.

The joint power of appointment might have been exercised in various ways, without injuring the estate of Isaac Jones. It might have made his estate neither better nor worse, by appointing that the daughter should take in-tail general before the sons. It might have made his estate better, by appointing the fee at once to him.

I give my opinion upon this part of the case, as it would have stood if the mortgage of 1823 had not been executed.

The mortgage certainly does not make the title worse, but rather better, as under it the legal estate in fee may be acquired. The next question is, if the certificate be confirmed, ought the Court to decree the defendant to take the title? And I am of opinion, that the Court ought to do so. Though I am clear in opinion, that the certificate is substantially right, I am free to admit, that, in the abstract, the certificate of the Court of Common Pleas, confirmed by Sir John Leach, must create a doubt, when there is only opposed to it the certificate of the Court of Exchequer. But it is impossible to read the pleadings in this cause, and not see that the real intention of the plaintiffs and the defendant was to call in question, as Sir William Follett, according to the report in *3 Meeson & Welsby*, is stated to have said, the authority of the decision in *Badham v. Mee*; and that if it should be held, that the decision in *Badham v. Mee* was not law, the defendant should take the title. It would have been absurd to have made the agreement of the 1st of July 1835, upon the supposition, that if a decision were made against *Badham v. Mee*, the defendant should still not take the title, on the ground, that decision against decision left the matter in doubt. The utmost that could have been expected in favour of the title was, that a decision might be obtained in opposition to that in *Badham v. Mee*; and, as I understand the agreement of the 1st of July 1835, the objection to the agreement of the 15th of November 1833, in respect of its being made by Isaac Jones and Patrick Brown, for a sale at one entire sum, is one that cannot now be taken. The decree must, therefore, be to confirm the certificate, and order a specific performance, with costs to be paid by the defendant.

V.C. }
Jan. 13. } LORD BUTE v. STUART.

Pleading—Practice—Discovery—Production—Contents of Partnership Books.

It is no ground of objection to setting forth, in an answer or examination, the contents of books or accounts, that they belong to a partnership, in which the defendant or examinant has only a joint interest with other persons, not parties; although in such a case that may be a ground for not ordering the production of such books and accounts.

A party, who is otherwise bound to make the discovery, is only protected where he shows the absence of a legal power, or of physical ability in himself, to make it.

The decree in the cause, made in February 1818, directed, among other things, an inquiry, whether the plaintiff, Mary Wortley, late Countess of Bute, as devisee for life of the collieries, therein mentioned, or the defendant, William Lord Archbishop of Armagh, as her executor in respect of such her life estate, received or derived any benefit or profit from the use and application of the produce of the coals and monies in the working and carrying on the said collieries, from the time of the decease of John Earl of Bute; and the consideration of interest on the amount of such balance, &c. was reserved. In 1828, interrogatories on the matter of the inquiry were exhibited by the then plaintiffs for the examination of Lord Wharnccliffe, one of the defendants, and the answer and examination of Lord Wharnccliffe was put in. In 1839 further interrogatories were exhibited for the examination of the same defendants.

The first interrogatory inquired, whether the defendant was not engaged in partnership with Lord Ravensworth and J. Bowes in working and carrying on the collieries in question; and how long he had been in such partnership?

The examinant stated, that he was engaged in such partnership, and had been so from the year 1809, or *thereabouts*.

The VICE CHANCELLOR held, that this answer was insufficient, not being specific as to the time inquired after.

The second interrogatory was, whether the accounts and books of account of

the partnership, and, in particular, the books and accounts for and during the years 1792, 3, 4, were not now, or had not been, at the office of the partnership, in the custody of one N. Wood.

The examinant in answer said, *he believed* that the said accounts and books are and are kept at the office on the quay of Newcastle, in the custody of the said N. Wood, as agent for the said partnership.

The VICE CHANCELLOR held this answer as to belief to be sufficient; and said, that the examinant could not, nor could any other person, be supposed to have personal knowledge of the facts to the extent to which the interrogatory went.

To the third interrogatory, the examinant answered, and admitted that N. Wood had, during the last two years, applied to the examinant and his partners for directions or instructions respecting the accounts and books of the partnership, and that the examinant and his co-partners had concurrently given directions to Wood not to produce the said accounts, or books of account, or any of them, to any person whatever, or allow any stranger to inspect them without the express direction or authority of the examinant and his co-partners. The sufficiency of this answer was not disputed.

The fourth interrogatory required the examinant to set forth a full, true, and particular list or schedule, and description of all and every the ledgers and day-books, &c. of and relating to the partnership, and their dealings and transactions, during the years 1792, 3, 4, which then were, or at any time had been, in his possession, custody, or power, or in the possession, custody, or power of his solicitors or agents, or of the partnership of which he was then a member, or of the said N. Wood, or of any person or persons, as agent or agents of the partnership, and which contain any entries or entry relating to the particulars thereafter mentioned, viz. the quantities of coal resting at the pit's mouth and the staiths belonging to or used by the partnership at the death of the testator, John Earl of Bute, and the subsequent sale of such coals, and the clear amount of money produced by the sale thereof, and when and by whom such monies were received, and how the same were applied;

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and also the sums due to the partnership, at the death of the said Earl, from the fitters, and from the Tyne Bank, and from the cashier of the collieries, and from the other persons indebted to the partnership, and when and by whom the same were received, and how applied, and whether the said plaintiff, Mary Wortley, late Countess of Bute, or her said executor, received any benefit or profit, &c. (as in the decree), or relating to any such particulars, or which contained any entries or entry, shewing, or tending to shew, the quantity of coals sold by each of the fitters, in each month of the years 1792, 3, 4, or the price at which such coals were sold, and in whose possession the said books, &c. were.

The fifth interrogatory required him to set forth a full, true, and particular schedule or copy of all and every the entries or entry contained in any of the said books by the last interrogatory mentioned or inquired after, which in any way relate to the several particulars and matters in the last interrogatory mentioned, and to state, with reference to each of the said entries, in what book or account, and in what page, the same is to be found.

The sixth was as follows—"Say, whether you have, before putting in your answer and examination to these interrogatories, made yourself, or caused to be made by others, and whom, any and what search into or examination of the several accounts, or books of account, of the partnership in your custody, or in that of your solicitors or agents, or of the partnership, or of the said N. Wood, or what steps you have taken to enable yourself to give the information asked by these interrogatories?"

To the fourth, fifth, and sixth interrogatories, the examinant said, he had set forth in the schedule a list and description of the said books, which are in the said office, and which books are not in the possession or power of this examinant, but of this examinant and his two co-partners jointly; and this examinant has no right or power to remove, part with, or produce the same, or any or either of them, without the consent or authority of his said co-partners, and that the books, comprised in the said schedule, are very voluminous,

and the accounts therein of great length; and that he had never read or examined any or either of such books, accounts, or entries, and the examinant is wholly ignorant of such books, accounts and entries, and he knows not, and is unable to set forth, as to his belief or otherwise, a full, true, and particular schedule or copy, or description of all or every the entries or entry (if any) contained in such books, relating to the particulars and matters in the said interrogatories. And the examinant saith, he hath no right or lawful power to set forth the contents of the said books mentioned in the schedule hereto, or any or either of them, or any part of such contents as required by this interrogatory, without the consent or authority of the said co-partners, even if this examinant knew or had the means of setting forth such contents. And for answer to the sixth interrogatory, the examinant saith, he hath, before putting in this answer and examination to the said interrogatories, made or caused to be made by his solicitors, Messrs. Jones, Bateman, & Bennett, an inquiry, as to the number, nature, and extent of the books and accounts comprised in the schedule hereto, and he has been informed and believes, that the same are very voluminous and extensive, and, save as aforesaid, he saith he has not, before putting in this his answer and examination to the said interrogatories, made himself, or caused to be made by any other person, any search into or examination of the several accounts and books of account mentioned in the said schedule hereto, of or relating to the said partnership, which commenced in the year 1726, now in the possession or power of this examinant and his said co-partners as aforesaid, or taken any steps to enable himself to give the information asked for by the said interrogatory.

Exceptions were taken to this answer and examination, and were allowed by the Master, as to the whole six interrogatories. Lord Wharnccliffe excepted to the Master's certificate. The first three exceptions were disposed of as above stated; one being disallowed, and two allowed.

Mr. Stuart and *Mr. Parry*, for Lord Wharnccliffe.—With regard to the last three exceptions, they depend upon this ques-

tion—whether the examinant could be compelled to produce and deposit these books and accounts with his clerk in court. It is clear, that one partner cannot be ordered so to produce partnership documents in opposition to the wishes of the other partners, in a suit in which they are not parties. It is not within the ordinary powers of one partner so to change the custody and place of deposit of the partnership papers, and the Court will not order a defendant to do that which he has not a legal power to do. But a statement or disclosure of the contents of a book is equivalent to the production of the book itself. If the contents are set forth, there is a right to compare the copy with the original. Production and disclosure of contents must be governed by the same rules, and the latter will not be ordered where the former would not.

Unsworth v. Woodcock, 3 Mad. 432.

Atkins v. Wright, 14 Ves. 211.

Somerville v. Mackay, 16 Ves. 382.

Latimer v. Neate, 4 Cl. & Fin. 384.

Mr. K. Bruce and Mr. Jacob, in support of the Master's certificate.—It is the right of possession which protects one partner from producing partnership books that he has only a joint interest in. It is not from any rule by which partnership knowledge and communications are privileged. If a partner becomes a trustee of his share in a trade, his *cestuis que trust* may require him to set forth the contents of the partnership books, although they cannot require him to take them out of the possession of his partners.

Mr. Stuart, in reply.

The VICE CHANCELLOR.—I do not understand from the answer of the examinant that the statement is, that he has not the means of giving the information which is sought. He does not say that he has not the power of giving or of procuring the information. If a party in his answer says that a book in question is not in his possession, but is in the possession of himself jointly with A and B, and that A and B will not permit him to produce it, that is an answer. The Court cannot order the production. But what is the difficulty here? How can it be presumed that this

partnership is unlike any other partnership, and is so constituted that one partner is not allowed to make a copy of entries in the books? So far as the circumstance of making a copy can be identified with the circumstance of production, the two things would be subject to the same rule. If you state a case in which it appears to be physically impossible to the defendant alone to make a production, then the Court says, that it can make no order upon him for production. So where a copy was required to be made, if it appeared that there were circumstances which prevented the defendant from making a copy, and that, in fact, he could not make it, of course the Court would not make an order that he should do that which is impossible. But is it represented on this examination that there is any impossibility? It does not appear to me that there is anything like it. It is stated, in the answer to the third interrogatory, that "the examinant and his co-partners have concurrently given directions to Wood not to produce the accounts, or books of account, or any of them, to any person whatever, or allow any stranger to inspect them, without the concurrence of all." But can a defendant, by joining with two other partners, make the matter rest on the concurrence of the three, unless he can shew that he had a right himself, as against the plaintiff, to give that authority to the joint agent? There is no pretence for that in the present case. What is said in answer to the succeeding interrogatory is a very different thing from a representation of any impossibility. He states, that the books comprised in the schedule are very voluminous: this statement has no reference to their contents, and is merely surplusage. Then he states, that he has no right or lawful power to set forth the contents of the books mentioned in the schedule hereto, or any or either of them, or any part of such contents as required by the interrogatory, without the consent or authority of his co-partners and the examinant. Now, I assume that to be true; but the answer does not go on to state that they have refused to give their consent. No such thing is said; and, therefore, as it stands, on his own statement, to that interrogatory, it does not appear that the ex-

aminant is unable to set forth the contents. Unless a physical inability is made out on the answer, my opinion is, that the Court must require the contents of the books to be set forth, so far as it is sought, and the examinant is able to do so.

First, fourth, fifth, and sixth exceptions overruled. One-third of deposit returned, and referred to the Master to review his certificate.

L.C.
June 24, 1840.
Jan. 18, 1841.

THE ATTORNEY GENERAL
v. THE EARL OF STAM-
FORD AND OTHERS; and
in the matter of BLUN-
DELL'S CHARITY; and
in the matter of an Act
of Parliament 52 Geo.
3. c. 101.

Charity—Petition—Information—Costs—Administration of a Charity—Certificate of the Attorney General.

It is in the discretion of the Court, if it thinks the case requires it, to decline making an order upon petition, under the act 52 Geo. 3. c. 101, and to require the parties to proceed by information.

During the pending of questions respecting the administration of a charity, an order of reference under the act 52 Geo. 3. c. 101, ought not to be made to the Master to approve of a scheme for the application and administration of the surplus income of a charity; but if an ex parte order to such an effect has been made by the Court under that act, and the whole subject referred to the Master is left to the exclusive conduct and management of the petitioners, (the trustees of the charity,) whose mode of administering the funds is challenged, and whose right to be such trustees is one of the matters in dispute, the presentation of another petition under that act, by other interested parties raising the questions in difference, has so much of sanction from the former order of the Court, as to make it reasonable that the question of costs of the latter petitioners should, at all events, be reserved until a decision of the Court shall have been made on an information filed for the administration of the surplus income.

Semble—The certificate of the Attorney

General must be obtained to all petitions under the act 52 Geo. 3. c. 101, except such as relate to matters which grow out of, or have reference to what the Court has before done upon a petition properly certified by the Attorney General.

The decision in The Attorney General v. the Earl of Stamford recognized and confirmed by the Court.

In this case, two petitions were presented to the Court; the one, being the petition of the Attorney General and two other persons interested in a charity, called Blundell's School, was presented in an information filed by the Attorney General, at the relation of those parties, against the trustees of the charity, and in the matter of Blundell's School, and also in the matter of the act 52 Geo. 3. c. 101; the other petition was presented by other parties interested in the matter of Blundell's School, and also in the act.

The material facts and circumstances will be found embodied in his Lordship's judgment.

Mr. Knight Bruce, Mr. George Turner, and Mr. Heathfield, for the petitioners, the inhabitants of the town of Tiverton.

Mr. Jacob and Mr. Stinton, for the trustees of the school.

Mr. Wigram and Mr. Rolt, for the masters of the school.

Jan. 18, 1841.—The LORD CHANCELLOR.—The charity property in this case, was devised in 1759, by the will of the founder, Peter Blundell, to be applied in support of a free school at Tiverton, and in founding exhibitions for boys educated at that school, and proceeding to the Universities; and other funds had since been given by other persons for similar purposes. The inhabitants of Tiverton were to be the first objects of the charity, but in the event of there not being 150 scholars from the town, foreigners were to be admitted, but, under a guard intended to protect the interests of the inhabitants. Salaries of a fixed amount were provided for the masters and ushers, who were prohibited from taking any more of parent or child, the testator declaring it to be his intention, that the school should be a free school, and he directed that six scholarships

should be established in the Universities, to be filled by scholars out of the school.

In 1735, upon an information, a decree was made, declaring that the scholars ought to be elected by a majority of the feoffees present at a meeting composed of a majority of the whole number; and it was referred to the Master to approve of a scheme for the application of the surplus income. The Master, by his report, stated, that there was not, at that time, any available surplus, but that when any should arise, it ought to be applied in increasing the allowances to the scholars at the Universities, or in establishing new scholarships, as the trustees should, under the circumstances, think best to answer the charitable purposes of the founder. By an order on further directions of the 1st of August 1740, this scheme was approved, but subject to the further order of the Court, and the parties were to be at liberty to apply to the Court from time to time, for further directions, as occasion should require.

The funds having increased, new scholarships were established, but no application was made to the Court, under the reservation in the order of the 1st of August 1740.

Questions arose as to the application of the charity funds and management of the school, of which the principal were, first, the appointment of feoffees, it being asserted, that the direction of the founder had not, in that respect, been attended to. Secondly, the election of foreigners (boys not inhabitants of Tiverton) into the school, it being asserted, that the guards provided by the founder for the protection of the town, had been neglected. Thirdly, the extension of the system of education to other useful subjects besides the teaching of the learned languages. Fourthly, the permission which had been given to the masters and ushers, to take boarders into their houses; and fifthly and principally, as to the boarders, who had been permitted to partake largely of the property of the charity, by being appointed to the scholarships at the Universities.

The income continued to increase, and exceeded the expenditure; and there was, therefore, a question as to the proper application of the surplus.

Some of these questions are of great importance, particularly the last; and in a

late case of *The Attorney General v. Lord Stamford* (1), I have had occasion very much to consider it, and my opinion upon it was very fully explained in my judgment. That question is not before me for decision in the present stage of this case; I only allude, therefore, to the opinion I expressed in *The Attorney General v. Lord Stamford*, to shew that it is a matter for deliberate consideration, and is not to be assumed as free from all doubt, that the mode in which the charity funds have, in this instance been applied, will be sanctioned by the Court. Whilst these questions remain undecided as to the principles upon which the charity is to be administered, it is to me obvious, that it is impossible to settle any scheme for the application of the surplus income. In executing the usual order for that purpose, the Master must either assume that the practice hitherto followed, is the proper course, and therefore found upon it his scheme for the surplus, in which case, the foundation may very possibly fail, and the whole expense be thrown away: or he must take upon himself to consider, and possibly depart from the practice hitherto followed, which would be beyond his jurisdiction.

Notwithstanding these very apparent difficulties, a petition was presented by some of the feoffees under the act of parliament 52 Geo. 3. c. 101, *ex parte*, simply praying for a reference to the Master to approve of a scheme for the application of the surplus income, and also a scheme for regulating the admission of the children of foreigners; and on the 4th of June 1839, an order was made according to the prayer of the petition. It appears, that, at the hearing of this petition, counsel appeared for some of the inhabitants of the town, to oppose the reference prayed, but that the Vice Chancellor declined hearing them, and made the order. I apprehend, that, in strictness, such counsel were not entitled to be heard; but as making orders under this act, is clearly discretionary in the Court, and ought not to be done in cases in which the Court sees that the jurisdiction given by the act cannot be exercised with justice to any parties, or with benefit to the charity, such counsel might, perhaps, have been heard with advantage, for

(1) *Ante*, 58.

the purpose of enabling the Court to judge in what manner that discretion ought to be exercised.

The order was made, and thereupon a petition was presented by several of the inhabitants of Tiverton, under the act of the 52 Geo. 3. c. 101, praying declarations upon these several points, and references to the Master, to whom the former reference had been made, to settle a scheme for the application of the surplus, in conformity with such declarations.

If this had been a proper case for the exercise of the jurisdiction of the Court, under the 52 Geo. 3. c. 101, the petition would have been a very proper mode of obtaining the judgment of the Court upon the several points on which its direction was required; and if the Court decided any of those points in favour of the petitioners, the orders made would have been a very necessary instruction to the Master, to whom the first order had delegated the duty of settling a scheme for the application of the surplus.

Upon hearing this petition, two objections were made, which appeared to the Vice Chancellor to be fatal; namely, that it had not received the sanction of the Attorney General; and that the object prayed for, could only be obtained, and the questions only entertained, upon an information. He, therefore, directed that the petitioners should pay the costs, but gave them leave to attend the Master under the former order, and to carry in a scheme under that order. As a general proposition, I think, that the two objections were well founded; but the order actually made, giving the petitioners leave to lay a scheme before the Master upon the former order, if not inconsistent with the allowance of these objections, appears to me to have been at least useless, for, as I have already observed, nothing could be done under that order before a decision had been come to, of the questions which were pending; and it could hardly have been supposed that the petitioners would become parties to a report, from which all those questions would necessarily be excluded, and which must have assumed, and to a degree insured the continuance of that course of administration which they sought to have altered.

I have said, that as a general proposition, I thought the two objections made, were well founded, which opinion rests upon the decisions in *Ex parte Rees* (2), *The Attorney General v. Green* (3), *Dean Clarke's Charity* (4), and *Phillipott's Charity* (5), and what was said by Lord Redesdale and Lord Eldon in *The Corporation of Ludlow v. Greenhouse* (6), which cases also prove that it is in the discretion of the Court, if it think the case requires it, to decline to make an order upon petition under the act, and to require the parties to proceed by information; and they appear to me also to shew, that under the circumstances, and during the pendency of the questions respecting the administration of the charity, the order of the 4th of June 1839, ought not to have been made; but as it was made, and the whole subject before the Master left to the exclusive conduct and management of the feoffees or trustees, whose mode of administering the funds was challenged, and whose right to be such trustees was one of the matters in dispute, it is quite a different consideration, whether the course adopted for the purpose of raising the questions in difference, had not so much of sanction, from the former order, as to make it reasonable that the question of the costs of that petition should, at all events, have been reserved. If, as the Vice Chancellor thought, and as I think, it was not competent for the Court, upon a petition under the statute, to exercise any jurisdiction upon the extensive and fundamental questions raised, as to the principle upon which the charity was to be administered, it appears to me that it could not be right for the feoffees to obtain an order *ex parte*, the effect of which must be, either to exclude all those questions, and the intervention of all persons differing from them in opinion, or to expose those parties to the necessity of adopting other and expensive proceedings, for the purpose of raising them, and which, if adopted, would render their own proceedings nugatory. The order made, notwithstanding

(2) 3 Ves. & Bea. 11.

(3) 1 Jac. & Walk. 303.

(4) 8 Sim. 34.

(5) Ibid. 381.

(6) 1 Bligh, N.S. 17.

standing the objection of those persons, though irregularly brought forward, may, I think, well be supposed to have been considered by such persons as indicating the opinion of the Court, that the subject was one proper for its administration and decision upon petition under the act; and if that had been so, it would have been difficult to support the objection, that the Attorney General's sanction had not been previously obtained to the petition, because, as the Vice Chancellor very truly observed, the Court has been in the habit of receiving petitions under the act, though not signed by the Attorney General, upon matters which grow out of, or have reference to what the Court has before done upon a petition properly signed by him; and if the Court were to exercise the large jurisdiction under the act of making *ex parte* orders, in cases in which questions exist which cannot be disposed of without an information, the greatest injustice might be done, if the parties interested in such questions, and likely to be affected by such *ex parte* orders, were not at liberty to apply to the Court, without the previous permission of the Attorney General. In *Ex parte Rees* and other cases already referred to, Lord Eldon has expressed himself strongly upon the danger which might arise in exercising the jurisdiction under the act, without due caution in this respect; besides which, if there had not been any other objection to the petition, the Court might probably have ordered it to stand over, that it might be seen whether that could not be rectified. I think, therefore, that the petitioners ought not to have been made to pay the costs of the petition, upon the mere ground of their error in the mode of proceeding; and thinking as I do, that another course must be taken, for the purpose of obtaining a decision upon the points in difference, before any scheme can be approved of for the application of the surplus, I think that the costs of the petition, with reference to its merits, and the case intended to be raised by it, ought to be reserved till such a decision has been had; my opinion being, that if the petitioners succeed in the case they make, they ought not to be made to pay the costs occasioned by the error into which they have, I think, been naturally led.

There is now an information filed, raising all these questions, in which, if the parties continue to differ about them, they must be decided; and till that time arrives, I think that all proceedings before the Master, upon the order of the 4th of June 1839, must be stayed. I say stayed, because, if no alteration shall be made in the existing practice, in administering the charity fund, that order may, after that has been decided, become available. I also think, that the order of the 14th of February 1840, must be discharged; and although the information has superseded the petition, upon which the order was made, I think that the costs should be reserved until the fate of the information can be ascertained, and that for that purpose only, the petition should now be ordered to come on with the information. In *The Attorney General v. Green*, Lord Eldon referred it to the Attorney General to consider and report whether the information or the petition should proceed. I cannot think that necessary in this case, the Attorney General being a petitioner before me, praying that all proceedings under the order of the 4th of June 1839, may be stayed.

I think it right, in all cases, to abstain, as much as possible, from expressing any opinion upon matters not directly before me for judgment; but in the case of a charity, in which continued litigation, whatever be its result, must greatly exhaust the funds, otherwise applicable to objects the most desirable, I cannot but express a wish that both parties would consider whether that which both have in view, may not be obtained without much further expense.

It happens, that in the case of *The Attorney General v. Lord Stamford*, nearly all the questions in this case came before me, and I did not pronounce my judgment without the most careful consideration of all the principles and authorities which appeared to me applicable to it. The parties in this case may have reasons for wishing to have a judgment in their own case; and if so, they are certainly entitled to it; but before they determine upon proceeding adversely in the present litigation, they will, I have no doubt, inform themselves of the particulars of the case to which I have referred, and form their de-

termination as to their future proceedings, upon a due sense of what the interests of the charity may require.

V.C. }
Feb. 1. } ELWORTHY v. BILLING.

Vendor and Purchaser—Sale under Decree—Party bidding without Order for Leave.

Where, at a sale under a decree, a party not being a plaintiff, or having the conduct of the sale, or being a trustee of the property, but merely a defendant in the cause, bid, and became the purchaser, without any order of the Court permitting him to bid, the Court, at the application of another defendant, who was present at the time and place of sale, and then made no objection to the bidding, refused to set aside the sale; but refused the motion without costs.

By an order of the Court, certain leasehold granaries, lime-kilns, and other premises at Tideford, in Devonshire, were put up for sale by auction, at an inn in St. Germans; and Edward Billing, a defendant in the cause, without having previously obtained an order for leave to bid, then bid the sum of 810*l.* for the premises, and they were knocked down to him at that price. One of the other defendants, Thomas Billing, and his solicitor, were present at the sale, and made no objection to the purchase. A motion was subsequently made on behalf of T. Billing, that the premises might be again put up to sale, and if more than 810*l.* should be bid, then that the purchase by Edward Billing might be set aside, and that, if necessary, the Master's report, finding E. Billing to be the purchaser, might be taken off the file, and that he (E. Billing) might be ordered to pay the costs of the motion, and of the re-sale.

Affidavits were filed by both parties, as to the effect which the bidding of E. Billing probably had upon the sale, and were contradictory. The auctioneer stated, that he believed if E. Billing had not bid at the moment he did, the property would have been knocked down to the previous bidder; and that he waited a long time afterwards, and was perfectly satisfied no person in the room would bid more. It also appeared, that the premises had been valued by the

same auctioneer, about three years before, at more than twice the sum.

Mr. Sharpe, in support of the motion, cited—

Ex parte Reynolds, 5 Ves. 707.

Ex parte Lacey, 6 Ves. 625.

Ex parte James, 8 Ves. 337.

Mr. Jacob and *Mr. Willcock*, contra.

The VICE CHANCELLOR. — There is a very material difference between the situation, in which the present purchaser was placed, and that of an assignee in bankruptcy. If a person, in the situation of a trustee for sale, had chosen to bid for the property, it would be then reasonable that the Court should make an order similar to that which was made in the cases cited. The purchaser in this case is merely a party in the cause, not a trustee, nor a plaintiff having the conduct of the decree, or of the sale. There is certainly a general rule in this court, that a party shall not bid at a sale under its decree, without an order; and the Court will see that the rule is enforced. This application, however, is not made by the plaintiff in the cause, by whom the sale is generally conducted, but it is made by a co-defendant, who appears to have been present, and to have made no objection at the time of sale. I have never heard that such an order as that which is now asked has been made, in a case in which a person, merely connected with the cause by being a defendant, has happened to bid, without obtaining a previous order. In that point of view the application is new; and it is moreover made by a co-defendant, as against whom the act of the party in bidding, does not raise any ground of complaint. I think the motion must be refused, but, as the act was wrong, without costs (1).

(1) See 10 Sim. 101, where there is a note of the case of *Wilson v. Greenwood*, Easter term, 1819, from a manuscript of the Vice Chancellor. There the bill was by the assignees of a bankrupt partner, against the solvent partner, for an account and sale of the partnership property. The sale was decreed, and the solvent partner, without any liberty by the Court to bid, attended, and was declared the highest bidder. A motion to set aside the sale was refused by Lord Eldon. It does not appear, whether there were terms expressed or implied in the partnership agreement, giving a continuing partner any right of purchase or pre-emption.

M.R. } THE ATTORNEY GENERAL v.
Jan. 14. } KERR.

Practice.—Costs.

The defendants were ordered by the decree to pay costs as between party and party. Certain extra costs had been incurred by the relator in taking new office copies, in consequence of the original papers having been accidentally destroyed by fire in the office of his solicitor:—Held, that the defendants were not liable to pay these extra costs.

The costs of this information had been ordered to be paid by the defendants, as between party and party. The offices of the relator's solicitor were in Paper Buildings, in the Temple, and were destroyed by the fire which occurred there in 1838; and in consequence of the papers in this information having been then burned, it became necessary to take new office copies.

On the taxation of costs, the Master refused to allow the charges for these second copies, and the relator presented a petition by way of appeal from the Master's decision.

Mr. Pemberton appeared in support of the petition, and insisted, that the defendants ought to pay all such costs as were necessarily incurred, in order to obtain the decision of the Court, and that these papers were destroyed without any negligence on the part of the relator or his solicitor; that if two counsel were retained in a cause, and one of them was promoted to the Bench, and it became necessary to retain another counsel, the additional expense of retaining a third counsel was allowed by the Master.

Mr. George Turner and *Mr. Parry*, for the defendants, contended, that the expense arising from an accidental occurrence of this description, ought not to fall upon the defendants; that they had no power or right to inquire in what manner the plaintiff's solicitor secured his papers, and that they ought not to be responsible for a loss, unless they were in such a position that they were authorized to take precautions to avert it.

Mr. Pemberton replied.

The MASTER OF THE ROLLS said, that although the defendants were to pay the

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costs of the information, it did not follow that they were to be charged with expenses which arose from accidents, over which they had no controul. If he were to grant this application, he should introduce a rule, that all additional expenses, properly incurred by a plaintiff in the prosecution of a suit, formed part of the costs of the suit.

His Lordship dismissed the petition, with costs.

M.R. }
Jan. 16. } BIEDERMANN v. SEYMOUR.

Will — Devise — Heir-at-Law — Contribution.

A testator devised parts of his real estates to different parties, and devised other part of them to his heir-at-law:—Held, that the last-mentioned estates were to be considered as descended estates; but that they were not liable to pay the testator's specialty debts, in exoneration of the devised estates, but that all the estates were to contribute to such debts pro ratâ.

John William Biedermann, who was possessed of considerable estate, both real and personal, made his will in November 1825, and thereby made a complete disposition of all his property, and, among other things, devised certain freehold estates to the person who was his heir-at-law, and who was also one of his executors.

The testator died in 1831, and his personal estate, which had come to the hands of his executors, was not sufficient for the payment of all his debts. This suit was instituted by the executors, for the purpose of having the estate duly administered.

The cause came before the Master of the Rolls in November 1840, when it stood over, for the purpose of having the question argued, whether the freehold estates, which were devised by the testator to the party who was his heir-at-law, ought not to be considered as descended estates, and applied in payment of specialty debts, before the estates specifically devised.

Mr. Pemberton and *Mr. Cankrien* appeared for the heir-at-law:

Mr. Cooper, *Mr. Dixon*, and *Mr. Flather*, for different parties, whose interests were opposed to the heir-at-law.

2 A

The MASTER OF THE ROLLS held, that the estates, which were devised to the heir-at-law, ought to be considered as descended estates; but that the question, whether they ought to be applied in payment of specialty debts, in exoneration of the devised estates, depended upon the intention of the testator; and that, as the testator had shewn an intention of devising these estates, as well as his other real estates, his Lordship was of opinion, that the testator's specialty debts ought to be borne by the devised estates proportionably with the descended estates.

Note.—Vide *Harmood v. Oglander*, 6 Ves. 199, and 8 Ves. 106.

V.C. }
Jan. 20. } SNOW v. HOLE.

Practice.—Process—Service of Subpœna—Partners.

Service of subpœna on some partners, defendants, ordered to be deemed good service upon other partners, defendants, who could not be found.

The bill was filed against several persons who were partners, and the subpœna had been served upon some of the partners, but the other partners, who were defendants, could not be found.

Mr. Knight Bruce and *Mr. Bigg* moved *ex parte*, that service upon some of the partners might be deemed good service upon the other partners, upon the authority of *Coles v. Gurney* (1). Upon inquiry of the registrar,—

The VICE CHANCELLOR made the order.

V.C. }
Jan. 25. } ATTORNEY GENERAL v.
PARGITER.

Practice.—Transfer of Cause.

A cause marked for one branch of the Court, may, after appearance and before answer, by consent of all parties, be transferred to the other branch of the Court.

(1) 1 Mad. 187.

The information and bill had been marked "Lord Chancellor." The defendants appeared; and, before any other proceedings in the cause, notice was given of a motion before the Vice Chancellor, that the cause might be marked and transferred to the Master of the Rolls.

Mr. Spurrier, for the motion.

All the parties to the cause consented.

The VICE CHANCELLOR made the order.

V.C. }
Dec. 4, 1840. } CALDECOTT v. CALDECOTT.
L.C. }
Feb. 5, 1841. }

Will—Devise—Construction.

A testator directed the residue of his personal estate to be invested in the purchase of lands situate as conveniently as might be to his estates in the parish of N, and directed such lands to be conveyed to such uses, &c., as his present lands were limited to. The testator devised one close of land at N. to C. M. C, in fee, and limited the rest of his estates at N. to several nephews successively for life, with remainder to their issue as purchasers, in tail male. He also devised an estate in the parish of S. K, ten miles distant from N, to J. T. C, for life, with remainder to the heirs of his body. And he restricted the tenants for life from working lime-kilns, and empowered them to jointure their wives to an extent greatly exceeding the annual rents of the estates at S. K, on which there were no lime-kilns:—Held, that the principal estates at N. constituted the property to which the after-purchased lands were to be added.

John Caldecott was entitled in fee simple to certain freehold hereditaments in the parish of Newbold-upon-Avon, in Warwickshire, subject to a charge of 500*l.* per annum, which was created by his marriage settlement, in favour of his wife for her life, in the event of her surviving *Mr. Caldecott*. He was also entitled in fee simple to other hereditaments in the same parish, which were not subject to this annual sum, and also to other hereditaments of much less value, in the parish of South Kilworth, in the county of Leicester.

Mr. Caldecott, by his will, dated the 4th of October 1834, devised part of his hereditaments in Newbold-upon-Avon, and including his mansion-house called Holbrook Grange, to his wife, for her life, (in addition to her jointure of 500*l.* per annum, which he directed to be paid to her out of other parts of his real estates,) if she should so long continue his widow, and like to live in the mansion-house; but, if she should prefer living elsewhere, then he gave her an annuity of 400*l.* per annum during her widowhood, instead of those hereditaments, which sum he charged on all those hereditaments. And, subject as aforesaid, he gave all his hereditaments in Newbold-upon-Avon, and several adjoining hamlets and parishes, to his nephew Charles Marriott Caldecott, for his life, with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of C. M. Caldecott, in tail male; with remainder to the testator's nephew John Thomas Caldecott, for life, with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of J. T. Caldecott, in tail male; with remainder to J. A. James, eldest son of his nephew J. James, for his life, with remainder to trustees to preserve contingent remainders; with remainder to the heirs male of the body of J. A. James, with remainder to the heirs male of the body of the testator's nephew Thomas Caldecott; with remainder to the right heirs of the testator.

And the testator devised his estate at South Kilworth, in the county of Leicester, to his nephew John Thomas Caldecott, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs male of the body of J. T. Caldecott, with remainder to Charles M. Caldecott in fee simple.

And the testator then directed that none of the persons, who, under his will, should become tenants for life, or be possessed of any estate short of a tenancy in tail, should be free from impeachment for waste; and that none of them should have power to continue working any of the lime-kilns or rocks of stone on his estate, except for providing a competent supply of lime for the agricultural or building purposes of his estates there or elsewhere. And he

empowered his nephews, or great-nephews, when in the actual possession of his said estates, by virtue of the limitations aforesaid, to charge the same premises, or any part thereof, with an annual rent-charge of 60*l.*, by way of jointure, for life, for any women they might respectively marry, for every 1,000*l.* which they should receive by way of portions, so that the entire charge so to be made be determinable at her or their death or deaths, or second marriage, and should not exceed the annual sum of 400*l.* to each such woman or women.

And the testator gave to his executors and trustees, eight of his Grand Junction Canal shares, to the intent they should pay the annual produce thereof to his wife, so long as she should continue his widow, and should choose to make Holbrook Grange her principal place of residence, to the intent the same might be applied in repairing and keeping in neat order and improving condition, his said dwelling-house, and its appurtenances, as well as the several walks and plantations belonging to it; and subject thereto, his will was, that his said canal stock shares should be deemed part of his personal estate, and should be disposable as such. And as to the residue of his personal estate, he gave the same to his executors, in trust to be by them from time to time, as they should think best, turned into monies, for the payment of his debts and legacies, as well those given by his will, as those which he might thereafter give by any codicil or codicils: and subject thereto, he directed his said executors and trustees from time to time, to lay out and invest the same, with all accumulating produce, in the purchase of other lands and hereditaments, to be situated as conveniently as might be to his said estates in the parish of Newbold-upon-Avon; and his will was, that all such purchased premises should be conveyed to the same use and under the same limitations and powers, or as near thereto as the then state of circumstances would admit, as his present lands and hereditaments were limited to; and he directed the produce of his personal estate to be paid in the meantime to the person or persons who would be entitled to the rents of the said real estate, if actually purchased, and as an addition thereto.

In January 1836, the testator made a codicil to his will, in which, after taking notice, that he had lately purchased some real estate in the parish of Newbold, subject to a rent-charge of 210*l.* per annum, during the life of Ann Umbers, therein named, he devised his newly-purchased estate, subject to the payment of the said annuity, to the same persons, and for the same interests as he had by his will (subject to his wife's estate and interest therein,) devised all his other real estate in that parish unto: to the intent that the said newly-purchased hereditaments might become and be considered as an additional part of his Newbold estate, and be disposed of therewith. And he directed that the income arising from his newly-purchased estate should be applied in payment of the said annuity, so far as such income would extend, and that all further monies which might be required for the fulfilment of the said engagement for the payment thereof, should be advanced by his executors, out of the profits arising from the residue of his personal estate.

After making two other codicils, which it is not material to set forth, the testator made a fourth codicil, dated the 23rd of March 1839, and thereby devised one close of pasture, situate in Long Lawford, in the parish of Newbold-upon-Avon, in the county of Warwick, which he then called his Chapel Close, and which he had theretofore in his will devised as part of the residue of his real estate, (but which devise he thereby revoked and made void.) to his nephew C. M. Caldecott, and his heirs and assigns.

The testator died in October 1839, and his will and codicils were duly proved shortly afterwards by his widow and his two nephews, John T. Caldecott and Charles M. Caldecott, the executrix and executors.

This suit was instituted by Charles M. Caldecott, against the executors of the testator's will, and his heir-at-law, and the devisees named in his will, for the purpose of having the trusts of the will carried into execution; and to obtain the declaration of the Court, that the estates to be purchased with the testator's residuary personal estate, ought to be conveyed to the same uses as his estates in the parish of

Newbold-upon-Avon stood limited to. It appeared, that the testator's estate at South Kilworth was about ten miles distant from Holbrook Grange, and that the annual rental of it was little more than 200*l.*, and that all his estates at or near Newbold were either adjoining or very near to each other; and that there were some lime-kilns and rocks of stone on the Newbold estates, but not on the South Kilworth property.

The cause came on to be heard before the Vice Chancellor, when his Honour held, without calling upon the counsel for the defendants, that the directions in the will for the investment of the residuary personal estate, were void for uncertainty.

The plaintiff appealed from this decision, and the appeal coming on before the Lord Chancellor, his Lordship directed that the testator's next-of-kin should be made parties to the suit. These parties having been added by amendment, the cause was now heard by the Lord Chancellor.

Mr. G. Richards, Mr. Hodgson, and Mr. J. Parker, for the plaintiff.—The residue of the personal estate is to be invested in the purchase of *other* lands, to be situated as conveniently as may be to the testator's said estates at Newbold; which lands are to be conveyed to the same uses, &c. as his *present* lands are limited to. That part of his estates which was devised to his nephews for life, with remainder to their first and other sons in tail, was the only part which was settled at all. And from the expressions used in the different devises, it is clear that the testator regarded the lands at Newbold as his family estate, which he intended should be increased by his personal estate. The powers to jointure and to work lime-kilns, can only apply to the Newbold estates, as the value of the other property is too small for a charge of 400*l.* a year, and there is no lime upon it.

Mr. Wigram and Mr. Metcalfe, for the widow, and *Mr. Jacob, Mr. Bethell, and Mr. Bird*, for the heir-at-law of the testator.—As the estate at South Kilworth is devised to John T. Caldecott for life, with remainder to the heirs of his body, J. T. Caldecott's life estate is enlarged to an estate tail; but the testator must certainly have intended that this estate should go to the

children of J. T. Caldecott, as purchasers; and it must, for the purposes of assisting the Court in putting a construction upon the whole of the will, be regarded as settled estate. In that view, there will be two estates settled in different manners; and the lands which are to be purchased, are to be conveyed to the same uses as the testator's present estates. The Court cannot fix a meaning for the testator, where he has left the case in so much ambiguity.

Mr. Spence, Mr. Girdlestone, Mr. Lloyd, Mr. Hetherington, and Mr. Martindale, appeared for other parties.

The following cases were cited:—

Mosley v. Massey, 8 East, 149.
Sherratt v. Bentley, 2 Myl. & K. 149.
Pyot v. Pyot, 1 Ves. sen. 335.
Doe d. Leach v. Micklem, 6 East, 486.
Browne v. De Laet, 4 Bro. C.C. 527.
Angerstein v. Martin, Turn. & R. 232;
 s. c. 2 Law J. Rep. Chanc. 88.
Doe d. Hayter v. Joinville, 3 East, 172.
Colson v. Colson, 2 Atk. 246.
Ambrose v. Hodgson, 3 Bro. P.C. 416.
Cogan v. Stephens, Lewin on Trusts,
 App. 698; s. c. 5 Law J. Rep. (n.s.)
 Chanc. 17.
Coryton v. Helyar, 2 Cox, 340.
Clements v. Paske, 3 Doug. 384.
Leslie v. the Duke of Devonshire, 2 Bro.
 C.C. 188.

Feb. 6.—The LORD CHANCELLOR.—In this case, the Vice Chancellor has considered the gift of the residue of the personal estate as void, on account of the uncertainty of the will as to the purpose to which it was to be applied. Now, the clause itself, which gives the residue, is not in itself ambiguous; and if it stood alone, there could be no doubt—nobody could entertain a doubt—as to what the meaning was, because the gift is of the residue to be laid out in the purchase of other lands, “to be situated as conveniently as may be to my estate at Newbold.” It then directs, that the after-purchased land should be conveyed “to the same uses as my present lands are limited to.” Now, speaking in that sentence of one estate only—of one description of lands, to which he applies the term the Newbold estate—

directing that his personal estate should be invested in the purchase of other lands, and that they should be applied to the same purpose as the present lands, the word “other” is clearly put in opposition to the word “present;” and there could be no doubt he meant the other lands, so to be purchased, to be added to the present lands at Newbold: nor could there be any question about that, if an ambiguity did not arise from looking at the other parts of the will. Now, upon looking at the other parts of the will, it appears that he had two estates, the Newbold estate and the South Kilworth estate. The newly-purchased lands are to be conveyed “to the same uses, and under the same limitations and powers as my present lands;” and certainly, if it had appeared, on looking to the other parts of the will, that there had been a gift of the absolute interest in the Newbold estate, and a settlement of the South Kilworth estate, so that the terms “to the same use, and under the same limitations and powers as my present lands,” could not be properly applied to the Newbold estate, mentioned in this clause, but were applicable to another, a doubt or difficulty might arise, whether he could possibly mean the Newbold estate, when he refers to provisions which are not applicable to that estate, but which are applicable to another. But when the terms of the will are referred to with reference to these two estates, not only does there seem to be no ambiguity raised by the mode in which he has dealt with these two estates, but that the other parts of the will distinctly confirm that which was the natural import and meaning of the clause itself, viz. that the present lands mean the Newbold estate.

Now, as to the Newbold estate, he had settled it to his nephews in succession, for life, and then to certain great-nephews, described not by the term great-nephews, but as being children of his nephews. He had therefore anxiously provided for several branches of his family, for his nephews in succession, and their children, and in default of those lines, to certain great-nephews. With regard to the South Kilworth estate, in point of law, he had not made even a tenancy for life, because, by legal operation, the first gift was a tenancy

in tail; but, I think, in construing the will, it must be supposed, that he thought the first gift of the South Kilworth estate would operate as a tenancy for life, for he has so described it. But there is in that gift only one estate for life, the others are in terms estates tail. You find, therefore, one estate settled to nephews and great-nephews, and the other given absolutely, subject only to an estate for life. Then in looking to the gift of the Newbold estate, we find that it is given to the uses and upon the trusts following. Now, it is of no avail to say that the will operated to pass the legal estate, because the question is what the testator meant; and we find, that in giving the Newbold estate, he says he has given it "to the uses, and upon the trusts" following,—expressions that are to be found in the description of the estates to which the purchased lands are to be added, but which are not to be found in the gift of the South Kilworth estate. Again, he says, they are to be subject to the powers of the estate to which he refers. There are powers applicable to the gift of the Newbold estate, but those powers are not applicable to the South Kilworth estate, which is proved by this, that in the one he specifies his nephews and great-nephews, who are provided for in the one gift and not in the other. Now that he considered the Newbold estate as his principal estate, and that he considered that was the property to which he in various parts of the will refers, when he speaks of the lands he had given, is established beyond all doubt by the last codicil, in which he gives a certain close of land, not one of those closes given to the widow, but one of those closes which are comprised in the general gift of the estate, and he says it was a close "included in the devise of the residue of my real estate," shewing, therefore, he considered the Newbold estate as his principal real estate; and shewing, though not accurately expressing himself in that codicil, that as being the estate to which the estate to be purchased by the residue of his personal property, was to be added. Therefore, without going beyond those parts of the will which may most legitimately be referred to for the purpose of seeing what estate he meant, it seems to me that the

clause which refers to "my present lands," as put in opposition to the "other lands," to be purchased, does not receive any ambiguity from the other parts of the will; and upon the clause itself, there could be no ambiguity, except it arose from other provisions applicable to the South Kilworth estate.

But then there are other circumstances on the face of the will itself, which put this construction of intention beyond all doubt. For instance, the personalty is to be laid out to be added to one estate or the other. That is the question between the parties. He had certain canal shares. He directs those canal shares to be applied in keeping up the mansion-house, which was part of the Newbold estate, and the residue to form part of his personal estate. But the strongest inference is to be drawn from the codicil, in which he describes the property he had himself purchased. It appears, that after making his will, and before the date of his codicil, he had himself purchased an estate which he in terms directs to be added to the Newbold estate. But he not only takes away from the personalty that which, according to the construction contended for on one side, would be devoted to the South Kilworth estate, but he does more: it appears that he purchased the estate under a contract, by which, he subjected himself to the payment of an annuity, and he not only, therefore, takes out of the personal estate the purchase-money he had paid down for this estate, but he directs that the annuity should be paid out of his personal estate. So that what he actually paid, he, himself, takes out of the personal estate, and he directs his executors, those who should come after him, to pay out of the personalty the annuity which he had made himself liable to pay, upon the purchase of that estate, which he had added to the Newbold estate. So that, upon the supposition that he meant the personalty to be added to the South Kilworth estate, he would in this way have been defeating, to a considerable extent, the purpose he is supposed to have in view. It is quite consistent with the intention of adding it to the Newbold estate, quite inconsistent with the intention of adding it to the South Kilworth estate. I think, therefore, there is cer-

tainly not that degree of ambiguity which would make it the duty of the Court to say, this is not a gift which the Court sees its way safely to declare to be in favour of those who take the Newbold estate.

But then it is said, that this is only part of the difficulty; because, supposing it to be added to the Newbold estate, still that the Newbold estate itself was divided into different classes of trusts, and that it was impossible therefore to ascertain to which class of trusts this was to be devoted. I think, on examining the terms in which the provision for the wife is made, no such difficulty exists. It is perfectly true, that he gives his wife, in a certain event, the life interest in his mansion-house, and certain closes of land therein particularly described, and in a certain other event she is to have an annuity in lieu of what he had so given. But as to both, in the one and in the other he gives the estate itself, subject as aforesaid. It is, "And subject as aforesaid, I give and devise my said manor or royalty, right of fishery, mansion-house, grounds, and hereditaments, with my water corn-mill and other my lands and premises within the several parishes, hamlets, or liberties of Newbold-upon-Avon, Long Lawford, Little Lawford, and Little Harborough, and in Rugby, Bilton, and Bretford, in the parish of Wolston, all in the said county of Warwick, to the uses and upon the trusts following." It is very clear, therefore, that although, strictly speaking, having given part to the wife for life, the word "subject" cannot strictly and technically be taken to apply to that portion of the property he had so given, yet in his contemplation he was giving the Newbold estate, subject only to the gift to the wife; and if that was so, it is quite obvious that he considered himself, particularly as he has stated in the last codicil that he considered the gift of the Newbold estate as a gift of the residue of his estate,—that he meant, when he directed his after-purchased lands to be added to the Newbold estate, he meant the Newbold estate, subject as aforesaid, that is, the Newbold estate, which was given to the uses and purposes before described, that is to say, not exclusive of those provisions which were introduced

and charged on the Newbold estate, as a provision for the wife. I think, therefore, either on the one ground or the other, there is not sufficient ground for supporting the conclusion the Vice Chancellor came to, that this is void for uncertainty: by which, of course, is meant, not that there is positive demonstration, but that there is reasonable certainty of what he meant, by referring not only to the clause itself, but to different parts of the will. I think, the reference to the different parts of the will, not only does not create ambiguity, but that they are all confirmatory of that which I consider to be the natural meaning of the clause, in which the estate is given.

Now, a case has been referred to, very analogous to the present, the case of *Browne v. De Laet*, for although the difficulty was not the same, there still was the same duty imposed on the Court, of finding out to what trusts the personal estate was devoted. There the testator had settled a certain estate, and he directed the personalty to be laid out in the purchase of other estates, and he had not declared to what purposes those after-purchased estates were to be devoted, but they were to be purchased in the vicinity of the Hertford estate, and the proprietor for the time being of the Hertford estate was to be the person consulted. Now, there was much greater ambiguity there than exists here, as to whether he meant the after-purchased estates were to be held as the Hertford estates were held. Those were the two principal circumstances relied on, and ultimately acted on in decreeing that the after-purchased estates were, from those two circumstances, principally to be considered as directed to be added, and held upon the same trusts, and for the same purposes as the Hertford estate. That is going a great deal further than I am called on to go in this case. Though there is little doubt that that was the intention of the testator, it is not very easy in that will to find words upon which the Court could fasten that intention. But I am not at all under the necessity of going so far here, because I have here a positive direction that they are to be held for the purposes of the one estate or the other; and I think, that taking the whole will

together, there is no doubt whatever that he meant the Newbold estate to be the estate to which the after-purchased estate was to be added.

V.C. }
Feb. 18, 19. } PAPILLON v. PAPILLON.

Settlement—Portion—Legacy—Satisfaction.

The trusts of a term created by the settlor for raising portions for children, provided that any sum or sums of money, which the settlor should in his lifetime, or by his will settle or give upon or to the children entitled to such portions, should be taken in satisfaction thereof, unless the settlor should by writing declare the contrary. The settlor devised the estate charged with the portions, subject to that charge, upon trust for sale, and out of the proceeds to pay 2,000l. each to two of the children, entitled to portions under the trusts of the term:—Held, that prima facie the legacies must be taken to be in satisfaction of the portions, and that it lay upon the children claiming both, to shew a declaration by the settlor to the contrary.

That the devise of the estate, subject to the charge of the amount of the fund raised for portions, did not entitle the children to the portions in addition to the legacies, in the absence of any express declaration to that effect.

By a settlement made in 1791, certain hereditaments were limited to trustees for the term of 1,000 years, upon trust (after the decease of the settlor and his son, to whom life estates in the same were limited) to raise and levy the sum of 5,000l. for the portions of all and every the children (other than the eldest son) of Thomas Papillon, the son of the settlor, by Ann his wife, to be equally divided between them, the shares of such of them as should be sons to be paid on their respectively attaining the age of twenty-one, and of daughters on their attaining that age or their marriage. And it was provided, that if the settlor should in his lifetime settle or give, or should by his last will and testament devise or bequeath to or upon any child or children entitled to a portion or

portions, to be raised under or by virtue of the trusts of the said term of 1,000 years, any sum or sums of money for his or their advancement or preferment in marriage, or otherwise, then such sum or sums should be accounted as part, if less, or, if as much or more, for the whole of the portion or portions thereby provided for him, her, or them respectively, unless the settlor should by writing under his hand signify and declare to the contrary. The remainder in fee in the same hereditaments was limited to the settlor. The settlor died, leaving three grandsons, and several granddaughters, all children of the said Thomas Papillon, by Ann his wife, and having made his will, whereby, after reciting the said settlement, he devised the estates comprised therein, subject nevertheless to the charge of the said sum of 5,000l., to trustees, upon trust for sale, and out of the proceeds of such sale, first, to pay his debts, and in the next place to pay 2,000l. to each of his two younger grandsons, when and as they should attain their respective ages of twenty-one years, with interest thereon at 4l. per cent. per annum, from the day of his decease; and he declared, that if his said two grandsons, or either of them, should die before attaining their or his age of twenty-one, the said sums or sum of 2,000l. respectively should not be raised, but should sink into the estates out of which they were directed to be raised. The two younger grandsons attained their ages of twenty-one, and the legacies of 2,000l. were raised and paid. It then became a question, whether the two younger grandsons were entitled, in addition to these legacies, to any provision under the trusts of the terms for portions; or whether the legacies were to be taken in satisfaction of their portions under the settlement. The bill was filed by the two grandsons as plaintiffs, for the purpose of determining the question upon demurrer.

Mr. Jacob and Mr. Freeling, for the demurrer.

Leake v. Leake, 10 Ves. 477, 489.

Fazakerley v. Gillibrand, 6 Sim. 591.

Mr. K. Bruce and Mr. Simpson, for the plaintiffs.

Earl of Kinnoul v. Money, 3 Swanst. 210, n., per Lord Hardwicke.

The VICE CHANCELLOR.—The portions are *prima facie* discharged by payment of the sums of 2,000*l.* It rests upon those who insist that the portions are not discharged, to shew that the testator has by some writing under his hand declared, that the benefits the children take under the will, shall not have that effect. [His Honour read the material parts of the will, and the clauses which had been referred to in argument, and remarked, that the devise of the residue of the real estate was made subject to the mortgage by the trustees of the term, but not subject to the term.] I find no expression in the will, that the advancement thereby made by way of legacies to the grandsons is not to be taken in satisfaction of their portions; and, I think, it is a satisfaction of them.

Demurrer allowed.

Southol. St. Luna Rang 5/2^d Ch 366.

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| V.C. | } | GRAVES v. HICKS. |
| Jan. 30; | | |
| Feb. 2. | | |

Devise—Estate for Life or in Tail—Revocation—Annuity—Mode of raising Arrears of Annuity charged on Real Estate.

The testator devised certain copyhold premises to trustees, in trust for his wife during her life or widowhood; and after other devises, he devised the residue of his real estate to trustees, to raise an annuity for her, and subject thereto to the use of his son for life, remainder to trustees to preserve, &c., remainder to the use of the first and other sons of his said son successively in tail male; and on failure of such issue, then (subject to a further annuity to the widow) to the use of the testator's grandson J. G. (son of his deceased daughter) for life, remainder to trustees to preserve, &c., remainders to the use of the first and other sons of J. G. successively in tail male; and on failure of such issue, to the use of trustees, in trust for the first and other sons of the testator's daughter, Anna Maria, successively in remainder (as in the two former devises) in tail male; and on failure of such issue, in trust for the testator's right heirs. Powers of distress and entry were given to raise the annuity charged on the lands for the benefit of the widow, and also powers to the testator's son and J. G. when in posses-

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sion, to charge the estates with portions for younger children. By a codicil, noticing the death of his son without issue, the testator devised a certain estate, after the death of his daughter, to her husband, and charged the lands devised as above with further annuities to his wife and to his daughter. By a second and third codicil, he made his wife his executrix and residuary legatee. By a fourth codicil, the testator revoked several of the dispositions theretofore made, and instead thereof he devised all his estates to his daughter for life; remainder to J. G. and his heirs in strict entail, as in his said will directed, and in case he should not be thirty-one when the estates should devolve upon him by the death of the daughter, he should not take possession till he attained that age, but the rents should accumulate and be in the hands of trustees for the benefit of J. G. and his heirs, and in failure of issue of the said J. G. the estates to go over, as was by his will directed.

Held, that the devise to the testator's wife of the copyhold premises, by the will, was not revoked by the fourth codicil.

That to revoke a clear devise, the intention to revoke must be as clear as the devise.

That under the will and fourth codicil, J. G. took an estate for life only.

*That the annuitant, the widow, being alive, and the lands upon which the annuity was charged being subject to the limitations for life and in remainder, as above stated, although a sum of 3,479*l.* was reported to be due to the annuitant, in respect of arrears of the annuity, such arrears ought not to be raised and paid by means of any sale or mortgage of the lands charged therewith.*

John Hicks, by his will, made in 1821, devised his copyhold messuage, called Plomer Hill House, in Buckinghamshire, unto and to the use of trustees and their heirs, in trust for his wife during her life or widowhood, or until she should cease to reside therein, and upon her death, marriage, or ceasing to reside, he directed his trustees to stand seised thereof upon the trusts after declared of the residue of his real estates; and he gave to the same trustees and their heirs, his freehold estate called Treravel, in Cornwall, during the lives of his niece Frances Mountstevens, and his daughter Anna Maria Hearle, in trust to raise an annuity of 20*l.*, and to

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pay the same to the separate use of his said niece, and to dispose of the residue of the rents to the separate use of his said daughter for life; and in case his niece should die in the lifetime of his daughter, then in trust to pay the whole to his said daughter, and after the decease of his said daughter, but subject to the said annuity of 20*l.* to his niece, to the children of his daughter as tenants in common in tail, with cross-remainders amongst them in tail, but in default of issue, then upon the trusts declared as to the residue of his real estates; and he devised all the residue of his real estates to the same trustees and their heirs, to the use, intent, and purpose, that his wife might during her widowhood take thereout one clear yearly rent-charge of 300*l.* per annum, with power of distress and entry, and subject thereto to the use of his son for life; remainder to trustees to support contingent remainders, remainder to the first and other sons of his said son in tail male; with remainder to the intent that his wife might take a further annuity of 100*l.* during her life or widowhood, and that the trustees might during the term for ninety-nine years, if his daughter should so long live, take a like annuity of 100*l.*, in trust for his daughter, for her separate use; remainder to the use of the testator's grandson, John Graves, for life, with remainder to the first and other sons of J. Graves, in tail male, remainder to the first and other sons of his daughter Anna Maria Hearle in tail male; with a proviso, that if any son of his daughter should be born in the lifetime of the testator, he should take a life estate only, with remainder to his first and other sons in tail male, with powers of charging and leasing, except the Plomer Hill House; with remainder to the testator's own right heirs. The testator bequeathed all his money in the funds to his trustees, upon trust, to pay the interest and dividends to his wife during her life or widowhood, with power to her to appoint 500*l.* for the benefit of his said son and daughter; and all his ready money which might happen to be in his mansion called Plomer Hill House, and the wines and stock on the said premises, he bequeathed to his wife for her own absolute use and benefit; and he gave all the furniture to his wife during such time as she

should be entitled to the mansion; and he gave all the rest and residue of his personal estate to his son, for his own absolute use and benefit; with a charge upon his funded property, and if insufficient upon the said residue, for payment of debts. He declared that the annuities to his wife were to be in addition to those settled on her at her marriage, and the testator appointed the trustees his executors. By a codicil of May 1822, the testator, referring to his will, and mentioning the death of his son, devised the Treravel estate, after the death of his daughter, to her husband, Francis Hearle, for life, with remainder to the same uses as were limited by the will, after the death of his daughter; and the testator charged all his residuary real estate with a further annuity of 100*l.* to his wife during her life or widowhood, in addition to the several annuities or yearly rent-charges of 300*l.* and 100*l.*, by his will charged thereon, or limited thereout, to or in favour of his wife, and which he did thereby ratify and confirm, and all the provisions made for her by his will and codicil; he also charged the same residuary estate with a further annuity of 200*l.* to his daughter, and of 100*l.* to her husband; and after reciting the bequest of his personal property at Plomer Hill, to his wife for life, he revoked that bequest, giving the same to his wife absolutely; and he also gave to her absolutely the residue of his personal property bequeathed by his will to his son: he also made a provision for his great-nephew, W. Mountstevens, and ratified his will in all respects save as altered by that codicil. By a second codicil, he appointed his wife sole executrix and residuary legatee of his personal estate; and by a third codicil, he directed that the proceeds of five shares in the County Fire Office should be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease, by his heir in possession.

His fourth codicil, of the 14th of September 1822, was as follows:—"I do make and add this further codicil to my will, revoking and making null and void *several* of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate and effects of all and every kind and descrip-

tion: instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, unto my daughter Anna Maria Hearle, for her life; and from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson, John Graves, and his heirs, in strict entail, as in my said will directed, with especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estate shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents thereof shall accumulate, and be in the hands of my trustees, for the use and benefit of my said grandson and his heirs. And in failure of issue of the said J. Graves, I order that my said estate shall go and descend as is by my said will directed. And I do ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. And I do further give and bequeath to my dear wife one other annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given her by my said will and codicils; hereby in all other respects but what is above mentioned, confirming my said will and codicils." By a fifth codicil, the testator declared the property bequeathed to his daughter to be to her separate use; granted an annuity to her husband; gave and confirmed to his wife any sum of money she might be entitled to from the effects of her late father, or any other friend, and ordered his executors, in case she died before him, to fulfil her will and disposal thereof.

The will, and the first, fourth, and fifth codicils were duly executed to pass freehold estates.

The testator died in June 1825, leaving his wife, Anna Maria Hearle his daughter, and John Graves, (the only child of a deceased daughter of the testator,) his heirs-at-law. John Graves was born in 1811. The effect of the fourth codicil upon the devise in the will to the testator's wife, of

the copyhold estate called Plomer Hill House, was argued before the Court of Exchequer, upon a special verdict, taken in ejectment brought against the widow, and judgment was given for the plaintiff, in Hilary term, 1827, which was reversed in error in the Exchequer Chamber, in the following Trinity term (1). The judgment in the Exchequer Chamber was affirmed in the House of Lords, thereby holding, that the devise of Plomer Hill House, in the will, was not revoked by the fourth codicil, mainly on the ground, that where there is a clear and specific devise, and a revocation which is only partial, the *onus probandi* shewing the specific devise to be revoked, is cast upon those who claim under the revocation, who must shew it to be as clear as the devise; and that here there did not appear an intention to revoke the devise (2).

In 1825, J. Graves, by his next friend, filed the bill in this cause against the widow, the daughter and her husband, and the trustees, to have the trusts of the will and codicils carried into execution, and the rights of the parties under them ascertained. On the hearing, before the Vice Chancellor, in December 1833 (3), a case was directed for the opinion of the Court of King's Bench, on the question, "Whether, under the will and codicils of the said testator, (subject to the preceding estates for life,) the said plaintiff (John Graves) takes an estate for life, or an estate in tail male, or an estate in tail general, in the real estate of the said testator respectively, and what is the estate which the said plaintiff (John Graves) takes, in each of the estates in Buckinghamshire and Cornwall, under the said will and codicils." This order was confirmed, on appeal, by the Lord Chancellor, in April 1835. The case was heard before the Court of King's Bench, in Michaelmas term, 1835; and the Judges of that court, by their certificate of

(1) *Hicks v. Doe dem. Hearle*, 1 You. & Jer. 470.

(2) *Doe dem. Hearle v. Hicks*, 8 Bing. 475.

(3) The case is reported in 6 Sim. 391, and 4 Law J. Rep. (n.s.) Chanc. 239, on the questions of priority in respect of the annuities; of cumulative or substituted legacies; and of the primary liability of certain estates to a mortgage under a settlement: but not on the points now stated.

the 2nd of February 1836, certified as follows:—

"This case has been argued before us by counsel, and we are of opinion, that the plaintiff (John Graves) takes an estate for life, in each of the estates in Buckinghamshire and Cornwall, under the will and codicils mentioned therein.

"J. PATTESON.

"J. WILLIAMS.

"JOHN TAYLOR COLERIDGE." (4)

Jan. 30.—The case was argued, first, on the question of whether the certificate of the Court of King's Bench should be confirmed.

Mr. K. Bruce and Mr. Bazalgette, Mr. Jacob and Mr. Koe, Mr. Girdlestone and Mr. Patch, Mr. Wigram and Mr. Sharpe, for the different parties.

The following authorities were cited:—

Wight v. Leigh, 15 Ves. 564.

Briston v. Boothby, 2 Sim. & Stu. 465;

s. c. 5 Law J. Rep. Chanc. 88.

Langley v. Baldwin, 1 Eq. Ca. Abr. 185.

Gretton v. Haward, 6 Taunt. 94.

Pierson v. Vickers, 5 East, 548.

Goodtitle dem. Sweet v. Herring, 1 East, 264.

Morse v. Marquis of Ormonde, 5 Madd. 99.

Ellicombe v. Gompertz, 3 Myl. & Cr. 127.

Robinson v. Robinson, 1 Burr. 38.

Doe dem. Cole v. Goldsmith, 7 Taunt. 209.

Doe dem. Wright v. Jesson, 5 Mau. & Selw. 95.

Feb. 2.—The VICE CHANCELLOR.—It very much struck me, when this matter was brought before me, on Saturday, and since that time I have read over the case, and all the cases that were cited, and I must say, that according to my opinion, there is no sufficient ground for disturbing the certificate of the Court of King's Bench. If the matter had been presented to the notice of the Court independently of the decision of the House of Lords, where the judgment of the Exchequer Chamber was

(4) 5 Ad. & El. 38; s. c. 5 Law J. Rep. (N.S.) K.B. 142.

affirmed, which reversed the judgment of Chief Baron Alexander, I cannot but think that there would have been strong grounds for holding, on the words of this codicil, (which are untechnical in the highest degree, and do not fall within the rule that Mr. Koe has cited from the mouth of Lord Redesdale—namely, the rule, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise,)—from the words the testator has used in the fourth codicil, that the true intent was to make the variation such as it is, by giving all the freehold, copyhold, and personal estate in the manner in which he made the particular limitation of the particular estate in the will; and the expression is, "unto my grandson John Graves, and his heirs in strict entail." Now, those, no doubt, are to a certain extent words of a popular nature; but, nevertheless, the words "strict entail" have acquired a certain technical sense; and *primâ facie*, if a testator talked of settling an estate on a man and his heirs in strict entail, I do not suppose, that any lawyer would imagine that it was intended that the first taker should be tenant in tail; he would conclude that the first taker should be only tenant for life, and that those persons who were designated, whoever they might be, should take in succession. Then the testator says, "as in my said will directed." There you have a plain reference, as it appears to me, without any straining of the words, to the particular modes of limitation, which by the will were made applicable to the estates thereby given. Then he gives with this additional clause "especial and positive orders, that in case the said John Graves shall not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate." Now, if you hold that the true intent of this devise is, that he shall take as tenant in tail, that clause becomes void,—you have nothing to do but to suffer a common recovery, and there is an end of it; whereas it is plain, that the testator meant that that should be a part of the provision which can only be

made to take effect, by holding that John Graves should take an estate for life. Then he goes on, and directs that this accumulation shall "be in the hands of the trustees, for the use and benefit of my said grandson, and his heirs;" which rather implies that it should be for the use and benefit of him and his heirs, in the sense that they shall have the use and benefit of it, which would imply that they would take in remainder after him. Then he says, "And in failure of the issue of John Graves, I order that my said estates and effects shall go and descend as is by my said will directed." If a strict construction were given to these words, "in failure of issue," they "shall go and descend," the direct effect would be to prevent their going and descending at all, as in the will directed, because the limitation over would be too remote, they being made to take effect on a general failure of issue, without there having been in the will a limitation "to issue," correlative with the general expression "of issue," found in this particular clause. That mode of construction, therefore, it appears to me, so far from effecting the disposition, would manifestly defeat it; and on the whole, especially when I consider what a view was taken of the case, with respect to the Plomer Hill estate, in the House of Lords, it appears to me, that it would be too much to say, that the certificate of the Judges of the Court of King's Bench is wrong. On the contrary, my own opinion is, that it is right.

There is one observation which has occurred to me, on reading the report of the case in the House of Lords, which is this: it is very remarkable, that my Lord Chief Justice Tindal, in giving the opinion of all the Judges, states, that they were not all agreed on all the parts, but that though they did not all agree in every particular part of the case, they all agreed in the general result (5). It is a very remarkable thing, that, for the purpose of putting a construction on the devise of a real estate, his Lordship expressly refers to the second and third codicils, which were unattested. This is a very singular thing, and might have afforded room for some cavil against

portions of the reasoning on which the judgment proceeds. It is observable, however, that that course of reasoning is likely to be established, because both wills and codicils must now have the same attestation.

I think that I ought not to disturb the certificate.

[The sum of 3,479*l.* was reported to be due to the defendant, the widow, for arrears of the annuities. It was argued, secondly, on the question, whether the arrears of the annuity due to the widow ought to be raised and paid by sale or mortgage of the estates charged with the annuity. The case of *Cupit v. Jackson* (6) was cited.]

The VICE CHANCELLOR.—I do not think that the authority of *Cupit v. Jackson* has any relation to the present case. In that case, John Jackson the elder seems to have been seised in fee; and on the occasion of the marriage of his first daughter Elizabeth Jackson, with a person of the name of Thomas Brailsford, he settled the estate so that there should be a certain annuity for himself for life, then an annuity to his wife for life, and then an annuity to T. Brailsford. Hannah Jackson, who was the wife of the settlor, died in the year 1778, and then it appears that John Jackson, her husband, married a second time, and he had issue by that wife a son, John Jackson the younger, and also a daughter Elizabeth, against whom, by mistake, the bill seems to have been filed. She had no interest. The settlor, by his will, as stated on the face of the case, devised the tenements in question, charged with the annuity, to John Jackson the younger, in fee; and then he died in the year 1780, and Thomas Brailsford became the sole annuitant, and the annuity was paid to him, with more or less regularity, during his life: he died, and by his will, appointed a certain person his executrix, who filed the bill against John Jackson the younger, at that time seised in fee of the estate, subject to the arrears of the annuity. The whole amount of those arrears was then finally determined, and there being but one demand, which at all

(5) See 8 Bing. 480.

(6) M'Clel. 495.

events must in some manner have been raiseable out of the estate, the Lord Chief Baron thought that the whole amount of the arrears having been ascertained, and the estate charged with the annuity, being in the hands of the defendant, who was seised in fee simple of it,—it was a right thing that the amount of those arrears should be raised by the sale or mortgage of the estate. That case appears to me to have no relation whatever to the present, because in the present case, the estate, out of which it is proposed that the arrears of the annuity shall be raised, happens now to be subject to settlement, as I understand it, to Mrs. Hearle, for life, with remainder to J. Graves for life, with certain contingent remainders to the first and other sons in tail, or some other person. I do not mean to give any opinion as to what estates the issue would take, or to advert particularly to them, but there are certain remainders over. The annuitant being alive, and some arrears having become due, the amount of which arrears I admit is now ascertained, it is proposed, that this Court shall make a decree to raise the amount of those arrears, by sale or mortgage, out of the settled estate. No case can be produced as an authority for such a proceeding; and it appears to me, that unless the Court finds it necessary to make a decree for the sale of the estate for some other purpose, there would be no ground whatever for making a direction, that the amount of those arrears now ascertained, but which will be liable very probably, in the course of a succession of years, to fluctuate—that there is no case whatever which authorizes me to say, that those arrears shall be raised in this manner. I do not understand that it is necessary now to give any direction for the sale or mortgage of the real estate, for any purpose; and my opinion, therefore, is, that all that can be done at present, is to let the matter go on; and if the future rents increase, the arrears will be diminished, and for aught I know, they may ultimately be paid. I should feel great reluctance to do that which is novel, and which is not supported by any principle that I have heard adduced, or by any case that has been cited.

V.C. }
Feb. 19, 20. } BROWN v. WEATHERBY.

Pleading—Parties—Heir-at-Law—Stat. 47 Geo. 3. c. 74, and 3 & 4 Will. 4. c. 104, Creditors' Suit—Partnership Debts.

A joint creditor of a partnership is entitled to sustain a bill for the administration in one suit of the real and personal estates of several deceased partners, against their representatives and the surviving partners.

The heir-at-law is a necessary party to a suit for administering the real assets of a deceased debtor, under the acts 47 Geo. 3. st. 2. c. 74, or 3 & 4 Will. 4. c. 104.

Weeks v. Evans, 7 Sim. 546, s. c. 5 Law J. Rep. (N.S.) Chanc. 16, overruled.

The principal facts of this case are stated in the report of *Brown v. Douglas* (*ante*, p. 14), upon the demurrer of other defendants to the same bill. After the demurrer of such other defendants was allowed, the bill was amended by stating, that Sedgwick died seised of certain real estate, and had by his will, after charging his real estate with the payment of his debts, given all his real and personal estate to his wife, the defendant Anne Sedgwick, and appointed Stanton and one Cotton, his executors; that Cotton had renounced probate, and Stanton alone had duly proved the will; that Anne Sedgwick, as devisee of the real estate, had entered into possession thereof; that the defendant Weatherby and R. Gibson, two of the executors of Douglas, renounced probate of his will, and the defendant Anne Douglas, his widow, alone duly proved the same, and took upon herself the execution thereof, power being reserved to J. H. Douglas, the son, to come in and prove the same, which it is alleged he had not yet done, but that he had acted in the execution of the will, and possessed himself of part of the testator's personal estate. There was also added by amendment to the former prayer, a further prayer that an account might be taken of the real estate of Sedgwick, and that the same might be sold under the decree of the Court, and that an account might be taken of the rents and profits of the said estates, received by his widow, and that she might be decreed to answer what should appear to be due

from her on such account, and that such rents and profits and the proceeds of such sale might be applied in payment of his debts, so far as the same should be necessary or would extend, and in a due course of administration.

The defendant Weatherby demurred for want of equity and multifariousness. He also demurred *ore tenus*, for want of the heir-at-law of Sedgwick as a party.

Mr. Jacob and *Mr. J. Russell*, for the demurrer.—The amended bill is more multifarious than the original bill, inasmuch as the real estate of Sedgwick is now sought to be brought in: all the objections to the original bill therefore apply, with the other objections, which are peculiar to the present bill. The heir-at-law of Sedgwick is moreover a necessary party as the bill is now framed.

Lord Redes. Tr. p. 171, 4th edit.

Graham v. Graham, 1 Ves. jun. 272.

Williams v. Whynates, 2 Bro. C.C. 399.

Salvidge v. Hyde, Jac. 151.

Winter v. Innes, 4 Myl. & Cr. 101.

Wilkinson v. Henderson, 1 Myl. & K. 582; s. c. 2 Law J. Rep. (n.s.) Chanc. 191.

Mr. K. Bruce, for the bill.—The case is identical in principle with that which was made upon the original bill (1). With regard to the demurrer *ore tenus*, the heir-at-law is only a necessary party, where the bill seeks to establish the will. The will does not carry the liability of the real estate farther than it is carried by the statutes (2). The plaintiffs do not require the presence of the heir to establish their title, and they therefore need not make him a party.

Weeks v. Evans, 7 Sim. 546; s. c. 5 Law J. Rep. (n.s.) Chanc. 16.

The language of Lord Redesdale shews, that the plaintiff may dispense with the presence of the heir, if he does need to "quiet his title," against any demand of the heir.

Mr. Jacob replied.

The VICE CHANCELLOR.—The case is still the same in substance, as it was when

it came before me on the former demurrer. It seems to me, that if the case of *Wilkinson v. Henderson* is to stand, the present suit is not multifarious. There were two partners in that case,—one died, and the bill was filed against his representative and the surviving partner; and the suit was held to be properly framed. If that be so, I think the principle must apply to a case constituted as the present case is. The representation on the bill is, that the joint estate is insufficient to satisfy the joint debts; and the right of the plaintiff, who represents parties that are joint creditors, is to have the separate assets of the partners, after satisfaction of the separate debts, applied in payment of so much of the partnership debts as the joint estate cannot satisfy. Now, for the purpose of ascertaining what is the surplus of the separate estate of one of the deceased partners, the suit must be so conducted, that the persons who are interested in the separate estate of the other deceased partner, may know what that surplus is, and be bound by the proceedings. If this be not done, it is obvious the whole proceedings will have to be gone over again in another suit. There may be some inconvenience, undoubtedly, in making one suit to embrace different estates; but I am far from thinking that inconvenience would be avoided, or even lessened, by adopting another course, in which the parties would have to make out in a suit, respecting the separate estate of one partner, the due administration in another suit of the separate estate of the other partner; and may thus be required to repeat several times the same proceedings. I shall look into the case of *Weeks v. Evans*, on the question which has been raised by the demurrer *ore tenus*. Sir Samuel Romilly's Act (3), which was passed in 1807, declared that all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty, in which the heirs are not bound, shall be paid any part of their demand; and I have always thought that the heir was a necessary party, where the real estate was to be made assets

(1) *Brown v. Douglas*, ante, p. 14.

(2) 47 Geo. 3. st. 2. c. 79; 3 & 4 Will. 4. c. 104.

(3) 47 Geo. 3. st. 2. c. 47.

for the payment of debts under that statute. I was required, when at the bar, to settle the bill of Sir Thomas Baring, in the case of *Devaynes v. Noble* (4), and it was my impression then, and now, subject to the doubt suggested by the case which has been cited, that in administering real estate devised, in a creditors' suit, the heir-at-law ought also to be a party.

Feb. 20. — The VICE CHANCELLOR.— I have been furnished by Mr. Richards with the brief in *Weeks v. Evans*. It was a creditors' suit by two persons, on behalf of themselves, and all other the creditors of the deceased; and it appears that the deceased devised all his estate to his wife, whom he made his executrix. She proved the will; and it further appears, that, at the time of the death of the testator, he was a trader within the meaning of the bankrupt laws. The wife being the sole defendant, the cause came on, I presume, as a short cause; and the common decree was made in a creditors' suit. The minutes, as drawn up, merely directed accounts of the personal estate. It seems that, at some subsequent time, there was some mention of this cause to the Court; for the registrar has a note to the following effect:—"Heir not a necessary party." That is also the note on the brief of counsel. At a subsequent time, there was an application in three causes, that is, in the first cause;—in a cause wherein J. Lowe and others were plaintiffs, and Anna Evans was the defendant; and in a cause in which Anna Owen and others were plaintiffs, and Anna Evans was the defendant. An order was made on the 1st of February 1836, by which the costs of the heir-at-law were directed to be paid by Anna Evans. What effect the other suits had on the order, I cannot tell: but there was some sort of arrangement, by which the heir-at-law was to have his costs paid. Otherwise I should say, that, but for that specialty, the decision is wrong.

Demurrer ore tenus allowed, without costs. Liberty to amend.

(4) 1 Mer. 529.

V.C. }
Feb. 24. } SMITH v. POOLE.

Statute of Limitations—Acknowledgment of Debt—Executor or Administrator.

An answer and inventory in the Ecclesiastical Court, made on the citation of the next-of-kin, stating the debts due from the estate of the deceased, and signed by the administrator, is sufficient to take such debts out of the operation of the Statutes of Limitation.

One Poole was indebted to Mrs. Phoebe Smith on a promissory note, of which he was the maker, in the sum of 200*l*. Mrs. Smith died, having appointed Poole her executor, and bequeathed the residue of her personal estate, including the debt on the promissory note, to the plaintiff. Poole paid the interest upon the note up to the year 1823, when he became embarrassed, and died intestate in 1826, leaving the principal sum and the interest from 1823 unpaid. The defendant took out letters of administration to the estate of Poole; and in answer to a citation by the next-of-kin, in a suit of *Poole v. Poole*, in the Consistory Court of Lichfield, the defendant in 1832 put in an inventory of the goods, chattels, and credits of the intestate, which contained the following statement, among other particulars.

"The exhibitant further declares, that there are still outstanding and owing, the following sums and claims against the estate of the said deceased, from the several persons undermentioned, viz.:—

| | |
|--|----------|
| | £. s. d. |
| Executors of late Phoebe Smith, on note | 200 0 0 |
| Interest thereon from Oct. 1, 1823, to { | 85 0 0 |
| April 1, 1832..... | } |
| Balance of principal and interest due.. | " |

The inventory was signed by the defendant. No other payment, promise, or acknowledgment of the debt appeared to have been made; and the question was, whether this was a sufficient acknowledgment in writing of the debt, to take it out of the operation of the statutes 21 Jac. 1. c. 16, and 9 Geo. 4. c. 14.

Mr. Jacob and Mr. Lovat, for the plaintiff, cited—

Freakley v. Fox, 9 B. & C. 130; s. c. 7 Law J. Rep. K.B. 148.

Tullock v. Dunn, Ry. & Moo. 416.

Mountstephen v. Brooke, 3 B. & Ald. 141.

Mr. K. Bruce and Mr. Anderdon, for the defendant.—The acknowledgment of the existence of the debt is not enough: to be of value of itself, the acknowledgment must be evidence of a promise to pay. This, if an acknowledgment, is unaccompanied by any promise, and made under circumstances upon which no promise can be implied. The act of 9 Geo. 4. does not make that to be evidence of the debt, which was not previously evidence; although it declares, that some things which were sufficient to establish a demand before that act, shall not afterwards be sufficient. The question, whether the signature of the document in the Ecclesiastical Court is sufficient to take the case out of the statute, is a purely legal question, and the defendant insists upon his right to have it tried in a court of law.

The VICE CHANCELLOR, after advertising to a peculiarity in the form of the note, which had been mentioned in argument, but upon which his Honour did not consider that any point in the cause turned, said, that the only question was, whether at the time of filing the bill there had been such an acknowledgment of the debt by the defendant, as to take the case out of the operation of the statute. He saw no necessity for sending this question for trial, in a court of law. His Honour then read so much of the document or inventory which had been signed, and put in by the defendant in the Ecclesiastical Court, as related to the debt in question, and the account of assets of, and claims against the estate; and observed, that it was quite impossible that any one could fail in distinguishing upon the face of the account, the sums which were inserted as debts, from those which were described as claims merely; and that the sum in question was clearly represented as a debt. The result was, that there was distinct evidence, that in the year 1832, the party who was now sued, admitted that the debt which was the subject of this suit, was then due; and it followed, that in this court the party to whom that debt belonged, was entitled to have an account taken of the assets. His

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Honour said, that by the statement of the pleadings in *Tullock v. Dunn*, it appeared, that the declaration averred promises by the executors; but from the expressions which Lord Tenterden is reported to have used in his judgment, it seemed that the evidence which had been adduced to prove the acknowledgment of the debt by all the executors, did not amount to proof of a promise by all of them. The plaintiff in that case was therefore properly nonsuited.

Here, the administrator had clearly admitted the existence of the debt, and an account of the debts and assets must consequently be taken.

Decree accordingly.

M.R. }
Jan. 14. } BAINBRIGGE v. BLAIR.

Practice.—Receiver, Discharge of.

A receiver of an estate had been appointed on the application of the plaintiff, one of the trustees having been guilty of misconduct, and the other trustees being incapacitated. New trustees were afterwards appointed by the Court, and an application now made by the plaintiff, that the receiver might be discharged, was resisted by legatees, whose legacies were charged upon the estate; but there being no personal objection to the trustees, and they undertaking (without entering into recognizances,) to pay their accounts half-yearly, as the receiver had done, the receiver was ordered to be discharged.

The testator in this cause, by his will, dated in June 1818, gave and devised his real and personal estate to three trustees, upon trust, after payment of his debts and legacies, for the plaintiff during her life, with remainder to her first and other sons in tail.

This suit was instituted for the administration of the testator's estate, and in May 1835, a receiver was appointed upon the application of the plaintiff (1). Mr. Blair, one of the trustees, and the only trustee who had taken any active part in performing the trusts of the will, afterwards became bankrupt, and in May 1835, three new trustees were appointed by the Court in

(1) See 4 Law J. Rep. (N.S.) Chanc. 207.

the place of the three trustees appointed by the will (2).

In 1838, the tenant for life died, and her eldest son, who had become entitled to the trust property, now presented a petition, praying, that the receiver might be discharged. The petition stated, that the new trustees were willing to act in the trusts, and that the expense of a receiver might thus be avoided.

The trust estate produced about 2,000*l.* a year, but it was subject to charges, which amounted altogether to 15,000*l.* There was, however, a sum of near 9,000*l.* consols, standing to the credit of the cause, to meet these incumbrances. The Master had not made any report of the amount of debts and legacies. All the legatees whose legacies were charged upon the real estate, were parties to the suit.

Mr. Pemberton and *Mr. Daniel* appeared in support of the petition; and contended, that as the new trustees were responsible persons, and were ready to pay the money which they received into court, there was no reason why the receiver should be continued at an annual expense of about 140*l.*, such receiver having been originally appointed upon the application of the plaintiff, and because the former trustees had either been guilty of misconduct or had been incapacitated.

Mr. S. Sharpe appeared for the legatees, and insisted, that the receiver was appointed for the benefit of all parties interested, and that the claim of the legatees was prior to the claim of the plaintiff; and that the legatees had relied on the receiver for protection, without regard to the new trustees.

Davis v. the Duke of Marlborough, 2 Swanst. 108.

Murrough v. French, 2 Mol. 498.

Mr. Pemberton replied.

THE MASTER OF THE ROLLS.—There is no doubt that where a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested; and that he is not to be discharged merely on the application of the party at whose instance he was appointed. This, however, is not a case in which it is pro-

posed to deprive one party of the protection he had by means of the receiver; but what is asked is, that the trustees should occupy the place of the receiver and receive the rents and profits, and apply them in the same way as the receiver has been directed to apply them. The only way in which the parties can be prejudiced is this, that whereas the receiver had given security for the due performance of his duty, the trustees would perform it in the execution of their trust, and without giving security. It is said, that these trustees had been appointed in the absence of the persons who now oppose this application; but the answer is, that the latter were parties to the cause, and were served with all the proceedings. The rejoinder is, that we had no occasion to look at the character or responsibility of the new trustees, because there was a receiver on whom we relied. The simple solution is, that one party ought to have proper protection, and the other ought not to be unnecessarily charged with the costs of a receiver; and I think I ought not to continue the receiver, if I am satisfied that he may be discharged without injury to the legatees: and the question then comes to this, whether there is sufficient reliance to be placed in the trustees. It would be quite a different case if the receiver were discharged, and the owner thereby put in possession. That is not the proposal here. It is proposed by means of the trustees to do, without expense, that which is done by the receiver at the expense of the owner of the estate; and the only question is, whether it can be properly and satisfactorily done. If any objections were shewn to the trustees, I would not grant the application. In the absence of any personal objections to the trustees, and on the understanding that they perform this duty gratuitously, I am disposed to discharge the receiver.

The trustees undertook, without entering into recognizances, to receive the rents, and to pass accounts every half year before the Master, in the same way as the receiver had done, and the Master of the Rolls then ordered that the receiver should be discharged.

V.C. }
Feb. 2. } JONES v. PRICE.

Specific Performance—Devise to Trustees and their respective Heirs and Assigns—Construction.

Devise to three trustees and their respective heirs and assigns, with power to the same trustees and their respective heirs and assigns, to sell and to give receipts for the purchase-money; and appointment of the same persons and their respective heirs and assigns, executors of the will. One trustee died, and the two survivors contracted to sell the estate:—Held, that the will should be construed, by rejecting the word respective; and the estate being charged with debts, that the two surviving executors and trustees could make a good title, and give a sufficient discharge for the purchase-money.

The testator, R. Willding, by his will, appointed his "three friends T. Longueville Jones, C. Jones, and J. Taylor, and their respective heirs and assigns, the executors thereof," and, having confirmed a settlement which he had made, devised some part of his real estate specifically, and bequeathed certain legacies, proceeded:—"I do hereby give and devise unto the said Thomas Longueville Jones, Charles Jones, and James Taylor, and to their respective heirs and assigns, all and every the residue and remainder of my estates, both real and personal, for ever, in trust for the purposes hereinafter set forth and declared; and first, that they, the above-named executors and devisees in trust of this my will, or their respective heirs and assigns, shall and do sell and dispose of all my real estates so devised to them by public auction or private bargain, and in one or more lots, as may appear to them the most advisable, and as soon after my decease as a purchaser or purchasers can be met with, possessing the means to pay a fair and marketable price for the same; and I hereby authorize and empower the said Thomas Longueville Jones, Charles Jones, and James Taylor, and their respective heirs and assigns, so to sell, release, and convey all the real estates herein devised to them, and to give legal receipts for the consideration-money that may be paid to them for the same; and I do hereby

declare it to be my will, that after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligation as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will to sell and convert into money all my farming stock, furniture, &c. as soon after my decease as to them may appear proper, but without prejudice, as to the furniture, to the accommodation hereinbefore given to my affectionate wife Diana; and out of the monies so arising, and all other portions of my personal estate, they, the executors of this my will, and their respective heirs and assigns, are required to pay all my just debts, my funeral and testamentary expenses," and certain legacies which he then referred to. The will then proceeded, "And I hereby will and dispose of all my real and personal estates in manner following, namely, that they, the said T. L. Jones, C. Jones, and J. Taylor, or their respective heirs or assigns, shall place all the said residue and surplus proceeds in some of the public funds in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper, and all the dividends and interest that may arise and become due therefrom is to be received by the executors and devisees in trust for this my will, or their respective heirs and assigns, and the produce by them paid" unto certain legatees therein mentioned, with bequests of the same to other persons in remainder. And he declared that his said trustees and executors respectively, and their respective heirs, executors, and administrators, should be accountable only for such monies as they should actually and *bonâ fide* receive, and that the one should not be answerable for the acts or defaults of the other or others of them, but each of them for his own acts and defaults only.

The testator died in 1821, and the will was proved by all the three executors. T. L. Jones took the name of Longueville, and afterwards died in 1832, leaving the defendant, T. Longueville, his heir-at-law, and having also devised to him all his trust estates. The two surviving trustees, C. Jones and J. Taylor, in 1839, contracted for the sale to the defendant Price, of an

estate of the testator, comprised in the said devise. The purchaser was advised that the surviving trustees could not themselves make a good title, or give a sufficient discharge for the purchase-money. Another agreement was made in 1840, to the same effect as the former, but in which T. Longueville was also added, with the two surviving trustees, as a party contracting to sell. It being still objected, that the vendors were not competent to sell, or give sufficient receipts for the purchase-money, the bill was filed by Jones and Taylor, against the purchaser, and T. Longueville, and prayed a specific performance of the agreement of 1839, or if they should not be competent to do so, then that the subsequent agreement of 1840 might be specifically performed.

Mr. K. Bruce and Mr. Purvis, Mr. G. Richards and Mr. Parry, and Mr. Hodgson, for the different parties.

The cases cited were,—

Townsend v. Wilson, 1 B. & Ald. 608.

Hall v. Dewes, Jac. 189.

Bradford v. Belfield, 2 Sim. 264.

Fisher v. Wigg, 1 P. Wms. 14.

The VICE CHANCELLOR.—The present case turns upon the construction of a will. In the case of *Townsend v. Wilson*, the question arose upon a deed, in which a power of sale was reserved to three persons and their heirs, and one having died, the Court of King's Bench held, that a good title could not be made by the two survivors. In *Hall v. Dewes*, the original articles had provided, that in the settlement to be made, a power should be contained, enabling a person there named, with the consent and approbation of the three trustees, their heirs or assigns, but not otherwise, to make sale, &c. A new trustee being appointed instead of one who retired, the question was, whether the power could be exercised with their consent. Lord Eldon said, that he did not agree with the decision in *Townsend v. Wilson*; and he asked whether the Court of King's Bench considered that the two surviving trustees, and the heirs of the deceased trustee, were to act together: observing, that it was one thing to say, that the survivors should not act until another was appointed, and a dif-

ferent thing to say, that the heirs of the deceased trustee could act in the meantime. Then the case of *Bradford v. Belfield* was a case of a conveyance by deed to one Whidborne, his heirs and assigns, in trust, upon request to him or them for that purpose, made by Baker, (who was a mortgagor,) his executors, administrators, and assigns, to sell and dispose of the fee-simple and inheritance of the estate. Whidborne died, and his heir, at the request of the executors of Baker, conveyed the estate in fee to the plaintiff Bradford, in trust to sell. Bradford sold the estate to the defendant Belfield; and the question was, whether that was a proper mode of dealing with the estate. I thought it was not a course which was justifiable under the provisions of the original trust deed.

This case, however, is upon a will; and there is of necessity a less degree of rigour observed in the construction of the words of a will, than is required in the construction of a deed. It appears to me, that unless the word "respective" be rejected, it is impossible to put any construction upon this will. The testator, in the first place, says, "I, Richard Willding, do make this my last will and testament, in manner following, and do nominate and appoint my three friends, Thomas Longueville Jones, his brother Charles Jones, and James Taylor, and their respective heirs and assigns, the executors thereof." It certainly appears, that the testator must have had a very imperfect notion of the meaning of the words which are here used. I apprehend, that the Ecclesiastical Court would not consider that the executorship should go to the heirs of the three devisees and executors, or to the assigns of the three. Of what are the persons so described, to be assigns? Of course, the executor of the surviving executor would be the person entitled to become the legal personal representative of the testator. The testator goes on,—“I give and devise unto the said” three persons, “and to their respective heirs and assigns, all and every the residue and remainder of my estates, both real and personal, for ever, in trust for the purposes hereinafter set forth and declared; and first, that they, the above-named executors and devisees in trust, of this my will, or their respective heirs and assigns,

shall and do sell and dispose of all my real estates so devised to them." This is nonsense as it stands. If no person could sell but the three trustees and their heirs and assigns, there never could be a sale. There could have been no heirs existing at the same time with their ancestors, and no assignees before there had been any assignment. The testator then empowers the same three gentlemen, and their respective heirs and assigns, so to sell, release, and convey all the real estates thereby devised to them, and to give legal receipts for the consideration-money that may be paid to them for the same. There then comes that part of the will in which the debts are charged: "and I do hereby declare it to be my will, that after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligations as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will to sell and convert into money all my farming stock, furniture, &c. as soon after my decease as to them may appear proper, but without prejudice, as to the furniture, to the accommodation hereinafter given to my wife. And out of the monies so arising, and all other portions of my personal estate, they, the executors of this my will, and their respective heirs and assigns, are required to pay all my just debts, my funeral and testamentary expenses." It appears to me, that the money to arise from the sale of the real estate, and the money arising from the personal estate, are both made applicable to the payment of debts; otherwise, there would be an useless and unmeaning change of language in that part of the will, where he directs, that "out of the monies so arising," the executors are to pay the debts. I think, the charge of debts upon the "monies," applies to the proceeds both of the real and personal estate. The testator afterwards directs, that several legacies shall be paid out of the fund, which must consist both of the real and personal estate, and then he says, "I hereby will and dispose of all the residue or surplus proceeds of all my real and personal estates in manner following." By the surplus proceeds, must be meant the fund which would remain after payment of both the debts and

legacies; "that they, the said Jones, Jones, and Taylor, and their respective heirs and assigns, shall place all the said residue and surplus proceeds in some of the public funds in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper; and all the dividends and interest that may arise and become due therefrom, is to be received by the executors and devisees, in trust, of this my will, or their respective heirs and assigns." This direction, as it stands, cannot possibly be followed. Supposing the three trustees to die, and leave three heirs, the law fixes who it is that shall receive the dividends and interest. It appears to me, that the true construction of this will is, wholly to omit the word "respective," and the language then becomes plain and intelligible. The testator must have meant the representatives of the joint body, who alone can receive the dividends or interest of the joint fund. It appears to me, that the whole instrument would be absurd, unless this construction be put upon it.

Declare, that the debts are charged upon the proceeds of the real estate, and decree a specific performance of the original agreement for sale.

V. C. }
Feb. 20. } JACKSON v. WOOLLEY.

Costs—Administration Suit.

Legatees' suit by an adult and an infant plaintiff, by A, his next friend. After decree and payment of money into court, A. dies. No other next friend is named, and the adult plaintiff does not prosecute the suit. The defendant, the executor, files a supplemental bill, and brings on the cause for further directions:—Held, that the adult plaintiff in the original suit was not entitled to her costs of that suit: that if any person would be entitled to such costs, as representing the plaintiff in that suit, it could only be the personal representative of the deceased next friend; and that the defendants in the original suit, and the plaintiff and all the defendants in the supplemental suit, were entitled to their costs out of the estate.

Thomas Jackson, and Mary his wife, and James Jackson and Francis Mary Jackson, infants, by the plaintiff Thomas Jackson, their next friend, filed the bill, claiming as residuary legatees of R. Woolley, against his executors and other parties interested, for an account. A decree was made, and money was paid into court. Thomas Jackson, the next friend, died, and Mary Jackson, the surviving adult plaintiff, took no step to prosecute the suit. J. Woolley, one of the defendants, and who was an executor of the estate, filed a supplemental bill, for the purposes of having the cause brought on for further directions, and the purposes of the suit accomplished. The original and supplemental suit coming on for further directions, a question arose with respect to the costs which the original plaintiffs, and the plaintiff in the supplemental suit, and the defendants in both suits, were severally entitled to, it being apprehended that the fund would be insufficient.

Mr. K. Bruce, Mr. Jacob, Mr. Richards, and Mr. C. P. Cooper; Mr. Wilbraham, Mr. Piggott, Mr. K. Parker and Mr. G. L. Russell, appeared for the different parties.

THE VICE CHANCELLOR.—The first question is, what is the general rule as to costs, where there is a fund in court, when a bill is filed by creditors on behalf of themselves and all other the creditors, or by those who stand one step behind creditors, as residuary legatees. I apprehend the rule to be, that when the cause comes on for further directions, and there is a fund either in court or in the hands of executors, in the first place, the costs of the suit are to be paid out of the fund. That is the general rule. Now, *prima facie*, if this had been brought to a hearing by the plaintiffs they would have had their costs, and those persons also who were made defendants, as a matter of course would have had their costs. But there is this singularity, the plaintiffs do not bring forward their cause to a hearing: I mean the surviving plaintiffs. After certain proceedings were had in the suit, and the report was made, Thomas Jackson died. Then a supplemental bill was filed, which stated the death of Thomas Jackson; that he had no interest in the subject of the suit; that by

his death the suit was without a next friend, and that the plaintiff is advised no further proceedings can be had therein, unless some person be substituted as next friend, in the place of Jackson. The supplemental bill also states, that Mary Jackson, as well as those interested in the original suit, refuses to become, or to procure any other person to become next friend to the infant: that applications had been made to them by Mr. Brundrett, to which they in effect put off the giving of any answer; and the result was, that they did not put the original cause into a state in which it could have gone on. Mrs. Jackson might have done so, but she did not. She did not procure another next friend, and took no steps to carry on the original cause. The consequence was, that Mr. Woolley, the principal acting executor, filed the supplemental bill; and on the answer it appears, that a clear necessity was imposed upon him for filing a supplemental bill by those persons who might have carried on the supplemental suit themselves, not having thought proper to carry it on; and they who are only enabled to appear now, owing to Mr. Woolley having brought it on, ask to have the costs of the original suit. The costs of the original suit, (if such costs are due to any person,) so far as they were incurred up to the death of Jackson, would be costs to be paid to his executors; but there is no person in that character before me. It may be, that Mrs. Jackson, as surviving co-executrix, if she had carried on the suit, might have been entitled to costs; yet if she does not carry it on, and if no personal representative of Jackson is before the Court, there is no person to whom I can direct them to be paid, as far as the original suit is concerned, up to the original hearing. I cannot direct them to be paid to those persons who are surviving plaintiffs to the original cause. They have done nothing, since Mr. Woolley alone has brought the matter forward, by filing the supplemental bill, and bringing on the suit. I cannot give the plaintiffs in the original suit any costs up to the present time. The defendants are not in fault, I cannot see how I could avoid giving them their costs. There is no representation that there is any unnecessary party; and if there were any such objection, it ought to

have been noticed at the time of making the original decree. The defendants must, therefore, be paid their costs. It seems, of necessity, that as there is a fund in court to be disposed of, those costs which are to be paid must, in the first instance, come out of that fund. It is said, that where there is a creditors' suit, an executor has no right after decree to pay any creditor. That observation must be taken with some qualification. If the executor after decree pays a debt, with the view of being reimbursed out of a fund in court, that payment must be taken in the same manner as if the fund was handed over to him after payment of costs; his right to be reimbursed must be subject to the costs being in the first place paid out of the fund. The matter comes before me on the supplemental suit. It seems to me, that if I deprive the plaintiffs of their costs of the original suit, I cannot avoid giving them their costs of the supplemental suit. Some final directions were necessary to dispose of the fund. I think the plaintiff, and the defendants to the supplemental suit, must have their costs out of the fund. Mr. Woolley, as executor, must have his costs first. The fund in court is applicable to the payment of the costs of the defendants in the original suit, and the costs of the parties generally in the supplemental suit, the executors being entitled to payment in priority.

V.C. }
Feb. 17, 18. } EEDS V. EEDS.

Baron and Feme—Separation—Settlement of Wife's Property.

A married woman, entitled to a chose in action, consisting of a principal sum, and not being in the shape of income, is prima facie always entitled in equity to a settlement of the fund, notwithstanding she may be living separate from her husband.

The plaintiff, Clara Eedes, intermarried with the defendant, John Eedes, in 1826, and, on the death of her mother in 1836, she became entitled to a share in a sum of 2,000*l.* consols.

The bill was filed against the husband and the trustee of the fund; and it stated,

that the plaintiff had, owing to ill treatment, been compelled to live apart from her husband; that no settlement had been made upon her of the trust funds or otherwise, and that she was in destitute circumstances. The bill prayed a reference to the Master to approve of a proper settlement of the fund in question. Evidence was gone into at considerable length, for the purpose of shewing what had been the conduct of the husband and of the wife before, and of the wife after their separation.

Mr. K. Bruce and Mr. G. L. Russell, for the plaintiff.

Mr. Jacob and Mr. K. Parker, for John Eedes.

Mr. Lowndes, for the trustees.

The cases cited were—

Ball v. Montgomery, 4 Bro. C.C. 339; s. c. 2 Ves. jun. 191.

Carr v. Eastbrooke, 4 Ves. 146.

Bullock v. Menzies, 4 Ves. 798.

Coster v. Coster, 9 Sim. 597; s. c. 8 Law J. Rep. (N.S.) Chanc. 230.

THE VICE CHANCELLOR.—I take it to be now settled law, that where a wife has a chose in action, which consists of a principal sum, and is not merely in the shape of income, she may file a bill against the trustees of the fund, and insist upon her right to a settlement. Circumstances may appear in which this Court would not assist such a claim by a wife, but there is nothing in this case to induce the Court to withhold from the wife that settlement of her property to which she is *prima facie* entitled. The evidence amounts to this: that the wife has used provoking language, and that the husband is of an irritable temper; but there is nothing to shew that she has ever deviated from the duty of a chaste wife. She has lived, since leaving her husband, in a laborious and penurious manner, supporting herself by her own industry, and receiving no support from her husband: so far his conduct is not free from blame. I do not, however, sit here to decide on the relative merits or demerits of the husband or wife. Let it be referred to the Master to approve of a proper settlement, and reserve further directions and costs.

V.C. }
Feb. 19. } TRAIL v. KIBBLEWHITE.

Legacy—Construction.

The testator gave a legacy to A, then a legacy to his (A's) sister M, then a legacy to their mother. He then bequeathed "to the three aunts of A and his sister M. 100l. each":—Held, that the aunts only, and not the sister, were entitled to the legacies of 100l. each.

The will of General Wemys contained bequests in the following words:—"To Captain James Wemys 1,000l., to his sister Mary Wemys 200l., to their mother 200l., and to the three aunts of Captain James Wemys and his sister Mary Wemys 100l. each." The legatee, Mary Wemys, under these words, claimed two legacies, one of 200l., and another of 100l. The executors declined to pay the latter sum, without the decree of the Court.

Mr. K. Bruce, for the legatee, Mary Wemys, argued, that the expression of the will meant, that the legacies of 100l. were to be paid to the three aunts, and also to the sister; that "and" necessarily implied "and to."

Mr. Bailey, for the executors, submitted, that the expression was only descriptive of the aunts; "and" evidently meaning the same as the words "and of" would have conveyed. This construction was fortified by the circumstance, that a legacy was given to the same lady in the sentence immediately preceding. He cited—

Weld v. Bradbury, 2 Vern. 705.

Lugar v. Harman, 1 Cox, 250.

Mr. K. Bruce, in reply.

The VICE CHANCELLOR.—The whole will must be taken together. The testator first bequeaths a legacy to Captain Wemys, then a legacy to his sister, and then a legacy to the mother, not, it must be observed, by the use of a pronoun which has reference to the last antecedent, the sister: that would have required the word "her;" it is not to "her" mother, but to "their" mother. The testator describes the legatee by the character of relationship which she bears to both of the preceding legatees. Then when he comes to bequeath to the aunts, he says, "to the three aunts of

Captain Wemys "and" his sister. He uses the same sort of phrase in describing the aunts as he had before used in describing the mother. The Court can declare the three aunts only, and not the sister, entitled to the legacies of 100l. each.

V.C. }
Jan. 21; } GOODMAN v. COMBES.
March 8. }

Practice.—Bill of Revivor—Order to revive.

If the plaintiff files a bill of revivor, and delays to obtain the order to revive, the defendant may obtain an order for liberty to revive, unless the plaintiff shall do so within a limited time.

A bill of revivor in this case having been filed, and a year subsequently elapsed, without any order to revive, it was moved on behalf of the defendant, that in default of the plaintiff obtaining the order to revive within a week, the defendant might be at liberty to revive the suit.

Mr. Bagshawe, for the motion, mentioned the case of *Gordon v. Bertram*, 2rd of Feb. 1815, Reg. Lib. A. 1815, fol. 376; s. c. 5th of March 1815, Reg. Lib. A. 1815, fol. 497 (1).

The VICE CHANCELLOR made the order.

March 8.—On a certificate that the plaintiff had not drawn up the order to revive,—

Mr. Bagshawe moved that the defendant might be at liberty to draw it up.

Ordered.

Jan. 30, 1841.—The LORD CHANCELLOR on this day gave notice, that, for the future, the rule of his court would be, that all causes that went out of the paper of the day for want of attendance, would be placed at the end of the list of causes, unless something extraordinary appeared to induce his Lordship to make an order to the contrary.

(1) Not reported. Extracted from the Registrar's book, and furnished to the counsel by Mr. Walker.

L.C.
 Nov. 20, 23, } THE ATTORNEY GENERAL v.
 1840. } THE IRONMONGERS' COM-
 Jan. 23, 1841. } PANY. (BETTON'S CHA-
 RITY.)

*Legacy—Charity—Cy-pres—Will—
 Construction—Practice—Attorney General.*

A testator, by his will, bequeathed the residue of his estate to a company, to apply the interest of one moiety to "the redemption of British slaves in Turkey and Barbary," one-fourth to charity schools in the city and suburbs of London, established according to the doctrines of the Church of England; and in consideration of the care and pains taken by the company, the remaining one-fourth to be applied by the company towards necessitated decayed freemen of the company, their wives and children. The first gift failed for want of direct objects, and the Court referred it to the Master to approve of a scheme for the application of the funds remaining unapplied, in consequence of the failure of the first gift, having regard to the different charitable bequests contained in the testator's will:—Held, that in the absence of any objects bearing any resemblance to the object that had failed, it was proper to look at the second object, but only as a guide to lead to what the testator would probably have done himself, and therefore not to be followed further than was proper to attain that object; that the testator having expressed his reason for the third gift, was a conclusive ground against the objects of that gift participating in the fund which had failed; and that the course to be adopted, under the circumstances, was to look at the second gift as an indication of the kind of charity preferred by the testator, and to make it as general in its application as the first gift was intended to be, viz. open to all who might stand in need of assistance:—Held, accordingly, that the fund in question which had failed, ought to be applied in support of charity schools, without any restriction as to place, situate in England and Wales, where the education was according to the Church of England, limiting the amount to 20l. per annum.

Held, that the Mico Charity, for the redemption of poor slaves, in the British Colonies, was not one to which the fund in question could be applied on the doctrine of cy-pres; although a charity may be cy-pres

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to the original object, which seems to have no trace of resemblance to it, and which may be very properly adopted if no other can be found having a more direct connexion with it.

In an information by the Attorney General, in which there is a relator, the Attorney General will not be allowed to appear, except in support of the information.

The trustees of the Mico Charity, not being parties to the information, were not allowed to be heard on the appeal, although they had presented their petition to the Court, had been heard in the Court below on their petition, and had, by their solicitors, attended the proceedings before the Master, on the reference directed to him by the Court.

Thomas Betton, by his will, which was dated in February 1723, devised and bequeathed as follows:—"I give and bequeath the rest, residue, and remainder of my estate, wheresoever and whatsoever, to the Worshipful Company or Corporation of Ironmongers of the city of London, and to their successors, making them my executors, upon this special trust and confidence in them reposed, that is to say, that they do, with all convenient speed that may be after my decease, place my estate out at interest upon good securities, positively forbidding them to diminish the capital sum by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed; viz. that they do pay one full half part of the said interest and profit of my whole estate, yearly and every year for ever, unto the redemption of British slaves in Turkey or Barbary; one full fourth part of the said interest and profits yearly and every year for ever, unto charity schools in the city and suburbs of London, where the education is according to the Church of England, in which number that in this parish is to be always included, and not giving to any one above 20l. a year. And in consideration of the said Ironmongers' Company's care and pains in the execution of this my will, the other fourth part of the said interest and profits, yearly and every year for ever, to the uses following: viz. 10l. a year to such minister of the Church of England as they shall from time to time entertain in their aforesaid hospital for

2 D

performing divine worship and other duties belonging to that holy order; the remains unto necessitated freemen of the said company, their widows and children, not exceeding 10*l.* a year to any family; but first deducting and paying quarterly out of this last-named fourth part of the interest and profit, 100*l.* a year, in discharge of the annuity given to my kinswoman, Mrs. Eleanor Smith, during the term of her natural life; and also, always reserving sufficient for keeping my tomb in good repair."

The moiety of the interest and profits of the testator's estate, given by his will for the redemption of British slaves in Turkey or Barbary, had, in 1829, by accumulations, amounted to a very considerable sum; and in that year an information was filed, seeking the opinion and order of the Court, touching the application of the fund in question to charitable purposes. And on the 19th of July 1830, Sir John Leach, M.R. made a decree, referring it to the Master to inquire, whether the whole, or any, and what part of the income of the moiety of the said charity estates and funds could then be applied to the use contained in the said testator's will, and if the Master should find that the whole or any part thereof could not then be so applied, then the Master was to consider what was the most proper application of the income of the said moiety, and the accumulation thereof, or of such part as could not then be so applied, regard being had to the said testator's will; and the Master was directed to take the accounts. The substance of the Master's report, dated the 20th of July 1833, and made in pursuance of such reference, was, that the income of the moiety of the charity estates could not be applied to the use contained in the will of the testator, there being no British subject held in slavery in Turkey or Barbary; and it stated that the Master had approved of a scheme, giving the income of such moiety of the charity estate to the charity schools in the city and suburbs of London, where the education was according to the Church of England, and to the Ironmongers' Company.

The cause coming on to be heard before Sir J. Leach, on the 12th of November 1833, on further directions, his Honour

declared, that the Court had no jurisdiction to apply the surplus income of the moiety of the charity property in question, and the accumulations thereof, to any purpose inconsistent with the intention of the testator expressed as to the application of that moiety unto the redemption of British slaves in Turkey and Barbary; and it was referred back to the Master to settle and approve of a proper scheme to be submitted to parliament for the application of the residue of the income of the said moiety, and the surplus of the accumulations thereof, and of the income of such surplus and accumulations, after setting apart the sum of 7,000*l.*, which the Master, by his report, found would be fit and proper to set apart, in order that the dividends and income thereof might form a fund to provide for the redemption of any British subjects who might thereafter be detained in slavery, either in Turkey or Barbary.

The Ironmongers' Company having presented a petition of appeal against the decision of his Honour, the same was heard before Brougham, L.C. on the 21st of November 1834, when his Lordship reversed the declaration of Sir J. Leach, and the reference back to the Master to approve of a scheme to be submitted to parliament; and in lieu thereof declared that the Court had jurisdiction to apply the surplus income of the moiety of the charity property in question in this cause, and the accumulations thereof, as near as might be to the intention of the said testator, having regard to the said bequest touching British captives, and also to the other charitable bequests contained in the will; and his Lordship, at the same time, ordered, that the cause should be remitted to be reheard before the Master of the Rolls, on further directions, on the report of the Master, dated the 20th of July 1833, on the footing of the declaration thereby made, not disturbing the other directions of the order of the 12th of November 1833."

The cause came on to be heard before the Master of the Rolls (Sir C.C. Pepys), on the 28th of April 1835; and after some discussion, principally arising from the situation in which the cause then stood, by reason of the previous orders made thereon, his Honour, on the 1st of May 1835, or-

dered and directed "that it should be referred to the Master to review his report, dated the 20th of July 1833, as to the scheme thereby approved of for the application of the said surplus moiety of the charity property and accumulations thereof, and of the dividends and income thereof, having regard, as near as might be, to the intention of the said testator, and to the bequest contained in his said will, touching British captives, and having regard to the other charitable bequests contained in the said will." In pursuance of the last-mentioned order, the Master, in the year 1839, made his report, which, after stating (amongst other things), that he had been attended by the solicitors for the relators, the defendants, and the Attorney General, and by solicitors in support of the three several claims made before him, on behalf of the trustees of the Mico Charity, the Seamen's Hospital Society, and the Royal Naval School, found "that there were no direct objects to which the surplus moiety and the accumulations thereof, and the dividends and income thereof, could be applied; and it having been argued before him, that he was, in the first instance, bound to consider the application of the surplus fund, having regard, as near as might be, to the bequest contained in the will touching British captives, without having regard also to the said charitable bequests contained in the will, and that he should not have regard to such other bequests, until he was satisfied that no application could be discovered, having regard, as near as might be, to the intention of the testator, as to the bequest contained in his will, touching British captives; and, on the other hand, it having been argued before him, that he was bound to consider of the application of the said surplus fund, having regard, as near as might be, to the intention of the testator, as to the several charitable bequests contained in the testator's will, he found that if the true construction of the order of the 1st of May 1835, should be, that he was bound, in the first instance, to consider the application of the surplus moiety, and the accumulations thereof, and of the dividends and income thereof, in reference only to the intention of the testator, as to the bequest contained in his will, touching British cap-

tives; and if the case of *The Attorney General v. Gibson* (1), cited before him, were a case which should appear to the Court applicable to the case before the Court, then that the application, proposed by the scheme brought in by the trustees of the Mico Charity, was an application as near as might be to the intention of the testator, as to the bequest contained in his will touching British captives, provision being first made for the increase of the comforts of such of the pensioners in Greenwich Hospital, as were present at the battle of Algiers, and for the education of such officers and men in the report mentioned; but if the case of *The Attorney General v. Gibson* should not appear to the Court as applicable to the present case, or one that ought to govern it, or if the true construction of the order of the 1st of May 1835, should be, that he was bound to consider of the application of the said surplus fund, having regard, as near as might be, to the intention of the testator, as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the said will, whether the case of *The Attorney General v. Gibson* should or not appear to this Honourable Court as applicable to the present case, or one that ought to govern it, then he found, subject to the provision being made for the increase of the comforts of such of the pensioners in Greenwich Hospital as were present at the battle of Algiers, and for the education of such other persons as in the said report mentioned, and subject as to the provision therein mentioned, as to the Seamen's Hospital Society, that the proper application of the said surplus fund would be for the better support of the charity schools in the city and suburbs of London, where the education was according to the Church of England, including therein the school of the parish where the

(1) In this case, Lady Mico, by her will, dated in 1670, gave a moiety of a sum of 2,000*l.* to redeem poor slaves, which she directed should be put out as her executors thought best, for a yearly reserve to redeem some yearly; and a decree was made on the 29th of July 1835, by Sir C. C. Pepys, M.R., approving of a scheme, by which the capital and dividends were directed to be applied by the trustees in the building of school-houses, and in the education of the apprenticed slaves in the British colonies.

testator dwelt, and the Royal Naval School, and the school attached to Greenwich Hospital. And the Master further found, that, save as aforesaid, there were no objects to which the said surplus fund or surplus moiety, and the accumulations thereof, and the dividends and income thereof, could be applied, having regard to the directions contained in the said order or decree of the 1st of May 1835.

Exceptions were taken to the Master's report by the Ironmongers' Company, and the trustees of the Mico Charity presented a petition, praying that the Court would adopt the scheme proposed by them, viz. by ordering the fund to be applied in the education and moral improvement of the apprenticed negroes in the West Indies, according to the plan adopted in the case of Lady Mico's Charity. The relator, by his petition, prayed the Court to make such order (having regard to the Master's report,) as it might deem just and proper.

The information came on for argument before the Master of the Rolls, in the month of February 1840, on the Master's report, when his Lordship, after hearing *Mr. Pemberton* and *Mr. O. Anderdon* for the Attorney General, *The Attorney General*, *Mr. Bethell*, and *Mr. Rolt*, for Lady Mico's Charity, and *Mr. G. Turner*, *Mr. Chandless*, and *Mr. Hubback*, for other persons, not parties to the information (2), declared, that there were no direct objects, regard being had to the charitable bequest touching British captives; and that the scheme of the defendants, so far as it proposed that the appropriation of the income to charity schools in the city and suburbs of London, where the education was according to the Church of England, and to the necessitated and decayed freemen of the Ironmongers Company, their widows and children, was a proper scheme; and the Court referred it back to the Master to review his report, and approve of a scheme accordingly.

The Master of the Rolls also decided, at the same time, that in an information

by the Attorney General, at the instance of a relator, the Attorney General ought not to appear, otherwise than in support of the information.

Appeals were presented by the Attorney General, and also by the trustees of the Mico Charity, against the judgment of the Master of the Rolls.

Mr. Cooper and *Mr. Anderdon*, in support of the appeal of the Attorney General, contended, that the Court below, whilst adopting the *cy-pres* doctrine, was wrong in giving all the fund to the charity schools of the city of London and its suburbs, and to the decayed freemen of the Ironmongers' Company, their widows and children, inasmuch as there was no finding by the Master, that there was no object, according to *cy-pres* doctrine, in favour of which the fund might be applicable; that the Court, in considering the "intention of the testator," in matters of *cy-pres*, must look at the whole of the will, and ask itself, what the testator would have done under such a state of circumstances, as those existing in the case before the Court; that no objects could be nearer the view of the testator than the seamen of the British navy, who were the individuals generally captured by the pirates, and became subject to the condition of slavery, from which the testator intended to relieve them.

Mr. Bethell and *Mr. S. Rolt*, in support of the petition of the Mico Charity, contended, that, although not a party to the information, they were entitled to be heard in favour of their clients, having attended the Master throughout the whole of the proceedings had under the reference to him, without any objection being raised to such attendance by the relators, especially as the Master had found conditionally, subject to the opinion of the Court upon a certain point, in favour of the scheme proposed by the trustees of the Mico Charity.

The LORD CHANCELLOR held, that the trustees of the Mico Charity not having obtained the proper authority to attend the Master on the reference to him, and not being parties to the cause, could not be allowed to intervene in the discussion on the appeal. His Lordship added, that if permission were given to the trustees of the Mico Charity in the present case to

(2) In the course of the argument, the following cases were cited—*The Attorney General v. the City of London*, 3 Bro. C.C. 171, *Moggridge v. Thackwell*, 7 Ves. 36, *Hayter v. Trego*, 5 Russ. 113, *The Attorney General v. Wansey*, 15 Ves. 231, *The Attorney General v. Bowyer*, 3 Ves. 714.

intervene, he could not shut the door of the court against other and numerous applicants.

Sir W. W. Follett, Mr. Wigram, and Mr. Sutton Sharpe, for the Ironmongers' Company, contended, that the Mico Charity had no resemblance to the objects which the testator had in contemplation when he made his will; that in the present case the testator, after providing for the redemption of British captives, had confined his bounty to schools where the education was according to the Church of England, whereas the Mico Charity was not a charity for redeeming slaves at all, but was a charity, established by a decree of the Court, for education, conducted generally by Dissenting ministers, and not according to the Church of England; that the proper objects of the bequest, under the circumstances, were the decayed freemen of the Ironmongers' Company, who were quite distinct from the corporate body, the corporate body being merely trustees; that the bequest was not the less a charitable bequest, because it was said to be in consideration of the trouble they might have; that the objection taken, that the Court must give the fund to the decayed freemen of the Ironmongers' Company, because something had already been given to them by the testator's will, was absurd; that the case of *The Attorney General v. the Bishop of Landaff* (3) was a very strong case in point, and in favour of the decayed freemen of the Ironmongers' Company.

The other cases cited, in the course of the argument before his Lordship, were—

Mills v. Farmer, 19 Ves. 483.

The Attorney General v. Dixie, 2 Myl. & K. 342 and 586.

The Attorney General v. the City of London, 3 Bro. C.C. 171.

The Attorney General v. Whiteley, 11 Ves. 241.

THE LORD CHANCELLOR.—The effect of the order of December 1839, now under consideration, is, that the moiety of the income of the property by the will devoted to the redemption of British slaves in Turkey and Barbary, ought, on failure of

such gift for want of objects, to be applied to two other objects named in the will. The first question I have to consider is, whether that application of the property ought to be sanctioned; and before I advert to the terms of the will, I must shortly observe upon the former orders, from which it must, I think, be inferred, that this mode of application has hitherto been disapproved by all the other Judges, by whom this question has been considered. The order of 1830 directed the Master, if he found that there were no objects of the first gift, to inquire how the moiety of the income destined for it should be applied, regard being had to the will, and to approve of a scheme accordingly, and to inquire whether it could be carried into effect, without the aid of parliament. The Master reported in favour of a scheme proposed by the defendants, by which this moiety of the income was to be equally divided between the two other objects named, namely, first, charity schools in the city and suburbs of London, where the education was according to the Church of England, no one school to receive more than 20*l.* a-year; and, secondly, necessitated decayed freemen of the company, their widows and children; and he reported that such scheme could be carried into effect, without the aid of parliament. When the cause came on before Sir John Leach, in November 1833, he differed from the Master in one respect, and declared that the Court had no jurisdiction to apply the fund to any purpose inconsistent with the intention of the testator, and referred it to the Master to approve of a scheme to be submitted to parliament, for the application of this moiety of the income. It appears to me, that his Honour could not have made this order, without being of opinion that the scheme approved by the Master was contrary to the intention of the testator, and one which ought not to be adopted. If he had approved of it, (being, as he was, of opinion that the Court had not jurisdiction to carry it into effect,) the obvious proceeding would have been to have put the case into a course to procure the sanction of parliament to an approved scheme, and not to have sent it back to the Master to settle another scheme, with the view of submitting such scheme to parliament. I

(3) Vide this case cited 2 Myl. & K. 586.

am aware that his Honour thought the direction in the will, that the income of the property should not be applied to any other purpose than what was therein mentioned and directed, operated in excluding the jurisdiction of the Court. But that went only to the question of jurisdiction, and must have been as applicable to any other scheme, as to that approved by the Master. When the cause came before Lord Brougham in November 1834, his Lordship differed from Sir John Leach as to the question of jurisdiction, and reversed that part of his decree, and declared that the Court had jurisdiction to apply the surplus income of the moiety of the charity property in question, as near as might be to the intention of the testator, having regard to the bequest touching British captives, and also the other charitable bequests in the will; and it was referred back to the Master of the Rolls to be re-heard on further directions, upon the Master's report of the 20th of July 1833, upon the footing of the directions thereby made. Lord Brougham being of opinion that the Court had jurisdiction, and that the prohibitory words of the will did not necessarily exclude the other charities mentioned in it, would, if he had approved of the scheme sanctioned by the report of the 20th of July 1833, have merely confirmed and acted upon that report, for in that he would have concurred in all that the Master had done. But such was not the course that he took, for in the report of his judgment (4) he says, it must be referred back to the Master to approve of a proper scheme, for the application of this surplus income of this moiety of the property. When the case came before me at the Rolls in May 1835, I had the greatest difficulty in making an order consistent with what had been before done; but, finding Lord Brougham's order varied the directions of the decree of 1830, though not in my opinion in anything material, as to what the Master ought to have regard to in settling a scheme, I could not act upon the report made, before such varied directions were given. I found it therefore necessary to send the case back to the

Master, with the direction in Lord Brougham's decree, to review his report. I did not feel myself competent to deal with the report already made. What I said therefore with reference to the scheme approved by that report, may be considered as extra-judicial; I did however express my opinion, that there were decided objections to the scheme approved of. That scheme, which has been in substance adopted by the Master of the Rolls, comes before me with a sanction and authority which demands the utmost and the gravest consideration, and which I have thought it my duty to give to it, but without being able to satisfy myself that my former opinion is incorrect.

It is obviously true, that if several charities be named in a will, and the first fail for want of objects, one of the others may be found to be *cy-pres* to that which has failed; and if so, its being so approved by the testator, ought to be an additional recommendation: but such other charities ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed. The point however is not open upon the present report, which was made under an order directing the Master, in settling the scheme, to have regard as nearly as might be to the intention of the testator, as to the bequests contained in his will touching British captives, and having regard also to the other charitable bequests in the will. By this I understand, the first subject to be considered was, the intention of the testator, which is to be ascertained from the gift in favour of British slaves, subordinate to which, and very possibly consistent with it, the other charities are to be considered; and this I conceive would have been the course to have been pursued, if there had not been any such special direction. Assuming then this to be the rule, it appears that the first charity is most general in its objects, being applicable to all British persons who should happen to be in the particular situation; that the second is limited to persons in London and the suburbs; and the third is confined to freemen of a particular company in London. It would seem therefore, although there be no impossibility of benefiting the British community at large, in the manner intended by the testator, none being

(4) 2 Myl. & K. 589; s. c. 4 Law J. Rep. (n.s.) Chanc. 5.

found in the situation anticipated, that it would yet be more consistent with his intention, that the same community should enjoy the benefits of his gift in some other way, than that it should be confined to any restricted portion of such community. In considering the manner in which such benefit could be conferred, it is very reasonable and proper to look to the other provisions in the will, in order to see whether the testator has indicated a preference to any particular mode of administering the charity. If the testator had given part of the property to support hospitals or dispensaries in any part of England, and another part to the assistance of a particular hospital, it would be reasonable to adopt the support of hospitals as a mode of applying the disposal of the funds; but there could not be any ground for applying the whole to the particular hospital. The only case referred to as giving any countenance to any such principle, is the case of *The Attorney General v. the Bishop of Landaff* (5), and stated in the Master's report in *The Attorney General v. Gibson*, dated the 23rd of July 1835. It is however to be observed, that there is no appearance of that case having been discussed; and the trust which failed was as limited as to the description of slaves as the present, and the scheme may have been adopted on the principle I act on, in adopting the second gift in the testator's will, as indicative of his preference of a particular kind of charity, and therefore to be preferred in the absence of any other more nearly resembling the objects which had failed. It may also be observed, that the scholarships appear to have been open to every description of candidate. If Lord Eldon had thought this the correct principle to act on, he would have given the whole fund to the two charities named in *Mills v. Farmer* (6), instead of referring it to the Master to approve of a scheme for distributing the fund, having regard to those two objects named, which was proper for the purpose of ascertaining what description of charity was most likely to be in conformity with the views of the testator. To assume, because a testator names two charities in his

will, that he would have given both legacies to one, if he had foreseen that the other could not be carried into effect, and therefore to give the provision intended for the object which has failed to the other, is in many cases totally inconsistent with the doctrine of *cy-pres*. The two objects may be wholly unconnected, and there may be other charities nearly connected with that which the testator intends to favour; but it is indicative of the testator's general views and intentions; and it may be very proper to observe the course he has pursued as to the gifts to the other charity. I think, therefore, that, in the absence of any objects bearing any resemblance to the object which has failed, it is very proper to look at the second object, but only as a guide to lead to what the testator would probably have done himself, and therefore not to be followed further than is proper to attain that object. But with regard to the third object, I cannot see any ground for considering it as indicative of the testator's general view, or any reason for supposing that he would, under any circumstances, have wished the provision to be increased. The objects are restricted within the narrowest limits; it is in that respect in direct contrast with the extensive nature of the first gift. But what appears to me to be conclusive against any reference to the third gift is, that the testator has expressed his reason for that gift, which can have no application to the moiety undisposed of. He says, that the third gift is in consideration of the company's care and pains in the execution of his will. It is true, that this compensation is given to the company in the shape of a provision for necessitated and decayed freemen of that company, their widows and children; and no doubt it is a charity. But on looking for evidence of the testator's general views and intentions with reference to the kind of charity to be favoured, it cannot be inferred, that he preferred the distressed persons of the company to all others, because he made a provision for them as a consideration for services to be performed by the company; and this consideration has already increased in a greater ratio than the increase of the property, it being well known that a large property may be administered at a less per-centage than a

(5) Vide 2 Myl. & K. 586.

(6) 19 Ves. 483.

small one. I am, therefore, of opinion, that this third gift cannot be referred to for any purpose, in settling a scheme for the application *cy-pres* of the fund intended for the first; but, I think, that the most reasonable course to be adopted, is to look to the second gift, as an indication of the kind of charity preferred by the testator, and making it as general in its application as the first gift was intended to be, that is, open to all who might stand in need of his assistance; which leads to this conclusion, that it should be applied in support of charity schools, without any restriction as to place, where the education is according to the Church of England, but not to exceed 20*l.* per annum to any one.

I see no ground for applying any part of the fund to the benefit of the pensioners of Greenwich Hospital, who were present at the battle of Algiers, or to the Seamen's Hospital Society, or the Royal Naval Benevolent Society, or the Royal Naval School, or the school attached to Greenwich Hospital, unless such schools fall under the description of schools to which I have before said I thought the fund ought to be applied; in which case, they may be entitled to a very favourable consideration.

I am also of opinion, that the Mico Charity is not one to which these funds can be applied, on the doctrine of *cy-pres*. The legacy, in that case, was to redeem poor slaves, in what manner the executors should think most convenient. In that gift, there was no restriction as to the description of slaves, or as to the countries in which they were to be looked for. There is however necessarily great latitude in exercising jurisdiction over charity funds, when the direct objects of the donor fail, and, therefore, very different opinions may be formed upon the subject in the same case. A charity may be *cy-pres* to the original object, which seems to have no trace of resemblance to it, but which may be very properly adopted, if no other can be found having a more direct connexion with it. The providing for the education of the poor, it may be said, has no resemblance to the object of the charity, which has failed; but none has been suggested, which unites those two qualities necessary to induce me to adopt it, namely, the applica-

tion of the fund in the manner for which the testator has expressed a preference, to the benefit of all who may stand in need of it.

I propose, therefore, to reverse the decree of the Master of the Rolls, except so much of it as declares there are no direct objects to which the gift respecting British captives can be applied, and in lieu of the part so reversed, to declare that the half part of the interest and profits of the testator's property, which, by his will, is directed to be applied to the redemption of British slaves in Turkey and Barbary, and the accumulations thereof, ought to be applied in supporting and assisting charity schools within England and Wales, where the education is according to the Church of England; but not to an amount of more than 20*l.* a year to any one school; and to refer it back to the Master to settle and approve of a scheme for that purpose. The relators and other parties to the suit must have their costs out of the fund, but the other parties who have appeared, cannot have any costs. Their appearance, and their taking part in these proceedings, is irregular; but considering the manner in which they were invited into the Master's office, and the circumstances under which these proceedings were taken, I cannot order them to pay costs.

V.C. } OTTWAY v. WING.
March 30. } WING v. OTTWAY.*

Practice.—Process—Married Woman.

Process against a married woman under a writ of execution of a decree made upon a compromise of a suit in which the married woman was a plaintiff by her next friend.

The plaintiff in the original cause was a married woman, suing by her next friend, and the bill was in effect for an injunction to restrain Wing from levying execution on her separate estate, for a debt due by her before marriage. The cross cause was to enforce Wing's equitable charge on the separate estate, and for an account and a sale.

* Ex relatione.

The parties compromised the matter, and an order was made, whereby it was declared, that Wing had an equitable charge on Mrs. Ottway's separate estate for the amount of his demand, therein specified; and it was ordered, that the plaintiff (Caroline Ottway) should within four days after service of a writ of execution of the order, pay to Wing the sum of 300*l.*, part of his said demand.

A writ of execution was served, and the money was not paid. The usual affidavit was made, but the registrar objected to the issuing of an attachment without the express direction of the Court.

Mr. Coleridge mentioned the case, and stated, that Mrs. Ottway was a party in the character of a *feme sole*, and that the order was made upon her as plaintiff. He referred to *Bunyan v. Mortimer* (1), where it was clear the order would have been made, if the married woman, a defendant, had been previously directed to answer separately. In this case, Mrs. Ottway, by her own act, had placed herself under the liabilities of a *feme sole*. He also mentioned *Bell v. Hyde* (2).

The VICE CHANCELLOR (after conferring with the registrar) observed, that Mrs. Ottway having as plaintiff constituted herself a single woman, for the purpose of the suit, she must take the consequences of disobeying the orders of the Court, made upon her as plaintiff; and his Honour gave leave to issue the attachment against her as a *feme sole*.

M.R. }
Jan. 20. } HOLFORD v. PHIPPS.

Trustees—Surrender of Term—Costs.

A term of years was limited by a marriage settlement to trustees to secure a jointure for the wife, if she survived her husband. The husband afterwards sold the estate, and the wife released it from her jointure, and the trustees were applied to by the purchaser of the estate to surrender the term:—Held, that the trustees were entitled to full explanation and evidence, that the interest of the wife,

which it was their duty to protect, had ceased; and such explanation and evidence not having been given, although the trustees were ordered to assign or surrender the term according to the direction of the purchaser, still the costs of the suit instituted by him to obtain such assignment or surrender, were ordered to be paid by the plaintiff.

By an indenture of the 2nd of December 1814, (being the settlement executed subsequent to but in consideration of the marriage of Mr. and Mrs. Crespigny, and which settlement was settled by a Master of the court, in consequence of Mrs. Crespigny being a ward of court,) certain real estates of Mr. Crespigny were limited to four trustees, (one of whom had since died,) for a term of ninety-nine years, from the death of Mr. Crespigny, in trust to secure to Mrs. Crespigny an annual sum of 400*l.*, thereby granted to her, during her life, in case she should survive her husband, by way of jointure.

In 1837, Mr. Crespigny and his eldest son contracted with the plaintiff, Major Holford, for the sale to him of the estate comprised in the settlement. It was proposed, that 11,430*l.*, part of the purchase-money, should be retained by the purchaser as an indemnity against the jointure of Mrs. Crespigny till her death, or until the release by her of her jointure, and that a further part of the purchase-money should be secured by a mortgage of the estate. The estate was conveyed to the plaintiff in fee by Mr. Crespigny and his son, by indentures of the 4th and 5th of April 1837; and a mortgage of it in fee, for the purpose of securing the two sums before mentioned, was made by the plaintiff to Mr. Crespigny and his son, by indentures of the 6th and 7th of April 1837.

Mrs. Crespigny afterwards consented to release this estate from her annuity, and the draft of a deed was prepared, and expressed to be made between Mr. and Mrs. Crespigny of the first part, the three trustees of the second part, and Mr. Crespigny and his son of the third part. By the first witnessing part, Mrs. Crespigny was to release this estate from her jointure, and by the second witnessing part, the trustees were to surrender to Mr. Crespigny and his son the estates comprised

(1) 6 Mad. 278.

(2) Prec. in Chanc. 328.

in the indentures of the 4th and 5th of April 1837, to the intent that the term of ninety-nine years might be merged.

No communication appeared to have been made with any of the trustees of the term, until the end of January 1838, when a draft of this last-mentioned deed was sent to Mr. M., one of the trustees, who was a solicitor, who returned it with the following memorandum at the foot of it: "Having looked at this draft, I must express my surprise that it was presented to me without any kind of explanation. With Captain Trent, the brother of the lady, I have now communicated; and he desires me to state, that he was equally uninformed of the proposed surrender of Mrs. Crespigny's jointure of 400*l.* per annum; he, however, concurs with me in agreeing, that if the sum retained by Major Holford is invested in the funds, or on mortgage, in the trustees' names, for protecting this jointure, he will consent to surrender the term, but not otherwise. In this, Captain Phipps, the other trustee, coincides."

The deed was afterwards executed by Mr. and Mrs. Crespigny, and was dated the 10th of April 1838, and was duly acknowledged by Mrs. Crespigny, as required by the 3 & 4 Will. 4. c. 74. Previously to its execution, a sum of 14,428*l.* 12*s.*, 3½*l.* per cent. bank annuities, had been invested in the names of three new trustees, as a provision for Mrs. Crespigny's annuity of 400*l.*, and the trusts of this stock were duly declared by an indenture, executed by Mr. and Mrs. Crespigny and the trustees of the stock, and bearing date the 6th of April 1838; but these facts were not communicated to the trustees of the term. The engrossment of the deed of the 10th of April 1838, had not been tendered to the trustees of the term for execution, and neither that deed nor any evidence that it had been executed and acknowledged by Mrs. Crespigny, had been produced to the trustees; but they had never made any application to be furnished with any such evidence, or to see the deed. The mortgage had been paid off, and the estate conveyed to the plaintiff in fee.

On the 8th of November 1838, the plaintiff's solicitors, who were also the solicitors of Mr. and Mrs. Crespigny, wrote the following letter to Mr. M., "On the part

of Major Holford, the purchaser of Mr. Charles Crespigny's estate of &c., as well as on that of Mr. and Mrs. Charles Crespigny, we are instructed to apply to you to know whether you will assign the term of ninety-nine years, vested in you and your co-trustees, for securing Mrs. Crespigny's jointure of 400*l.* Mrs. Crespigny, by a deed, acknowledged according to the statute, has discharged the estate from the jointure, as she has an undoubted right to do; and Major Holford, having paid the whole consideration money, is entitled to have the term assigned to a trustee of his nomination. Mr. Crespigny has amply secured Mrs. Crespigny's jointure by an investment of a competent sum in the public funds; and the deed by which it is secured, we are willing for your satisfaction, but not as a matter of right, to produce and shew to you, before any proceedings are taken to enforce an assignment. We have thought it right to require an explicit answer, whether or not you will assign the term, and should you decline to do so, for what reason."

No answer was returned to this letter.

The bill prayed, that the defendants might be decreed to assign or surrender the hereditaments comprised in the term, as the plaintiff should direct; and that they might be ordered to pay the costs of preparing and making a proper deed for assigning or surrendering the said term, and also the costs of this suit. It appeared from the answer, that on the 9th of February 1838, Mr. and Mrs. Crespigny called on Mr. M., and that Mrs. Crespigny then stated, that she was willing to release her jointure, provided the annual sum of 400*l.* were properly secured to her in some other way: that Mr. Crespigny said it should be secured by an investment of stock; and Mr. M. replied, that if this stock were placed in the names of the trustees of the term, they would surrender the term; but that Mr. Crespigny refused to allow such investment. The memorandum before referred to, was written on the following day—namely, the 10th of February.

Mr. Lloyd, for the plaintiff, said, that as the title of the plaintiff to have an assignment of the term was clearly shewn, there could be no doubt as to that part of

the decree; and he also contended, that as the proceedings of the defendants amounted to disputing the claim of the plaintiff to the estate, they ought to pay the costs of the suit.

Angier v. Stannard, 3 Myl. & K. 566;
s. c. 3 Law J. Rep. (N.S.) Chanc. 216.
Willis v. Hiscox, 4 Myl. & Cr. 197.

Mr. Pemberton and *Mr. Piggott*, for the defendants, insisted, that the defendants were not justified in divesting themselves of the term, until they were satisfied that the interest, for the protection of which the term had been created, had determined or had been released; and that as the plaintiff had not satisfied the defendants on these points, he must pay the costs of the suit.

Taylor v. Glanville, 3 Mad. 176.

Knight v. Martin, 1 Russ. & Myl. 70.

Poole v. Pass, 1 Beav. 600; s. c. 8 Law J. Rep. (N.S.) Chanc. 325.

Osbourn v. Fallows, 1 Russ. & Myl. 741.

THE MASTER OF THE ROLLS, (after stating the facts of the case, and reading the letter of the 8th of Nov. 1838).—To that letter no answer was returned, and thereupon this bill is filed. Though I do wish that a letter had been returned, I think I have never heard of a demand made which appears more unreasonable than that which is made in this case for costs. According to the constitution of our law, a very large proportion of the property of this country is vested in trustees—subject to their power. Trustees, in dealing with property vested in them, have often a very painful duty to perform, because they are frequently bound to refuse requests which are made to them by the parties interested; but they are subject to the greatest and most serious responsibility in the exercise of the power vested in them. If they either assist or obstruct those parties, in any disposition of the trust property, and in so doing commit any error, they are personally liable to all the consequences which may attach. Does it not then become of the utmost importance that they should not be called on to do what is not made perfectly clear, without some protection offered to them? These defendants had a duty to perform, to protect the interest of the lady for whom they were trustees; and if it was alleged,

that that interest was put an end to, they had as much right to have proof of that fact—to know what was put an end to—as to know what was done with any part of the property. Between the time when they received the draft, and the time when the memorandum was written, they had personal communication with their *cestui que trust*, who informed them, that she desired the term should be assigned, provided her annuity was otherwise well secured; and that took place on the day immediately preceding the memorandum. The plaintiff says, by his counsel, “I must take the memorandum as a decided answer, that unless this proposition is complied with, the trustees will not, under any circumstances, make an assignment of this term.” They had a communication with the *cestui que trust*, and made the reply contained in the memorandum; and there was no further communication between the parties, by which the trustees could be satisfied as to the propriety of what was asked. The other parties thought proper to act independently of the trustees, and without taking the trouble of finding out whether they were satisfied or not; and in November, comes the single question, will you do it or not?—[His Lordship again referred to the letter of November 1838.]—The trustees took no notice of this whatever. I am of opinion, the trustees were entitled to further information, and to evidence which was never produced to them; and that, without that explanation and evidence, they were justified in abstaining from making this assignment. No answer was given to the letter of November: I say I am sorry for it; but that is no reason why the plaintiff should be exempted from the performance of his duty of satisfying the trustees of the propriety of his request.

With regard to the observations which were made upon the trustees, I do not understand any observation to be made to their discredit. I have very often known changes made in trustees, for the purpose of having persons introduced into the trusts, who would do what the first trustees would not do. I do not, however, mean to shew the least suspicion of these trustees. But it does, nevertheless, appear to me, that, under the circumstances, the trustees of the term were entitled to have some fur-

ther information. I think there must be an assignment of the term, according to the direction of the plaintiff; and the plaintiff must pay the costs of this suit.

M.R. }
Jan. 22, 25. } CROSBY v. CHURCH.

Will—Construction—Husband and Wife.

A. bequeathed to C. C, a married woman, 1,000l. stock, to be transferred to her in her own name, for her separate use, and the principal to remain in trust of A's trustees till C. C's youngest child should attain twenty-one, when the principal was to be her own. A's executors transferred 1,000l. stock into the name of C. C, and she and her husband sold the stock before their youngest child attained twenty-one. C. C, after her husband's death, filed a bill to have this sum invested by A's executors. The executors were decreed to pay the money into court: but C. C. was held to have made a valid disposition of the dividends which should accrue due before her youngest child attained twenty-one, and consequently not to be entitled to any of such dividends.

Sarah Lonsdale, by a codicil to her will, dated the 9th of January 1814, bequeathed as follows:—"I give to my beloved granddaughter, Mrs. Charlotte Crosby (the plaintiff), over and above any former bequest, 1,000l. 3l. per cent. consols, to be transferred to her in her own name, and the interest to be for her own sole and separate use; and the principal to remain in trust of my executors and residuary legatee, till the youngest of her children shall attain the age of twenty-one years, when the principal shall be her own; or, in case of her demise, it shall devolve to her present husband, the Rev. Robert Crosby. Also, by this codicil, I do further appoint, that in case of the demise of my executrix, Mrs. Sarah Church, the wife of Henry Church, Esq., that their daughter, Sarah Church, shall be the person selected to fill that office jointly with the other two surviving executors, so as there may always be three."

The testatrix, by her will, had appointed the said Robert Crosby, and Edward George,

and Sarah Church, the executors and executrix thereof, and bequeathed her residuary personal estate to Mrs. Sarah Church. She died in March 1814, and her executors and executrix duly proved her will.

The two executors allowed Mrs. Church to have all the stock which belonged to the testator, including a large sum of 3l. per cent. consols, to be transferred into the name of Mrs. Church alone; and in March 1815, Mrs. Church transferred 1,000l. 3l. per cent. consols, into the name of the plaintiff, and in July 1816 she and her husband sold this stock, and the proceeds arising from the sale of it were paid to the plaintiff's husband, the said Robert Crosby.

Edward George died insolvent in August 1827, and R. Rimell became his administrator. Robert Crosby died insolvent in December 1836, and Mrs. Charlotte Crosby obtained letters of administration to his effects. Her youngest child, who was living at the death of the testatrix, attained twenty-one in May 1833, three years before Mr. Crosby's death, but her youngest child now living was not born till 1825. In 1838, she filed this bill against Mrs. Church and Mr. Rimell, and prayed that the defendants might be decreed to purchase into the name of the plaintiff the sum of 1,000l. 3l. per cent. consols, bequeathed by the codicil, in trust for the plaintiff; or if the Court should be of opinion, that she was not entitled to the principal till her youngest child now living should attain twenty-one, then that this sum might be transferred into the name of Mrs. Church and two other trustees, or transferred into the name of the Accountant General in trust in this cause, and the dividends paid to the plaintiff; and that the defendants might also be decreed to pay to the plaintiff such a sum as was due to her in respect of the dividends which would have accrued from the death of her husband.

Mr. Pemberton and Mr. Piggott appeared for the plaintiff, and cited—

Nail v. Punter, 4 Sim. 474.

Scott v. Davis, 4 Myl. & Cr. 87.

Mr. Tinney and Mr. Koe, for the defendant Mrs. Church, contended, that the stock was to be transferred to Mrs. Crosby, and she was entitled to the interest for

her own use, with power of anticipation ; she could, therefore, either alone or together with her husband, who had a contingent interest in the stock, make an effectual assignment of the stock.

Irwin v. Farrer, 19 Ves. 86.

Adamson v. Armitage, *ibid.* 416.

Elton v. Shephard, 1 Bro. C.C. 532.

Mr. Bromehead appeared for *Mr. Rimell*.

Mr. Pemberton, in reply, insisted, that it was doubtful whether the plaintiff was able to assign the dividends which might accrue between the death of the husband and the time when the youngest child should attain twenty-one.

THE MASTER OF THE ROLLS.—When claims of this kind succeed, which are brought by parties who have joined in the committing of a breach of trust, it is very hard upon the parties who have to pay. As to some part of this case, I cannot say that I entertain any, the least, doubt. There is one point upon which I have some difficulty. The first question is, what interest this lady took in the bequest which is given her by the codicil. [His Lordship read it.] The first direction is, that 1,000*l.* be transferred to her in her own name,—not to be her own absolute property, because it goes on to say, the interest is to be paid to her for her own use, and the principal is to remain in trust till the youngest of her children shall attain twenty-one, when the principal shall be her own. Then, therefore, the time has come when the stock is to be transferred into her own name. I apprehend that this is a construction which can hardly be doubted. It is to be transferred to her, but the principal is to remain in trust till the youngest of her children shall attain twenty-one, when the principal is to be her own ; therefore, then is the time to transfer.

But this is a gift, to take effect immediately, of the dividends, to be paid to her for her own use ; and a gift absolute of the principal, which is to be transferred when the youngest child attains twenty-one. That being so, the executors, as I conceive, erroneously transferred the principal into her name at the end of one year after the death of the testatrix. They did not suffer the principal to remain in their

own hands, but transferred it into her name at the end of one year. Being in her name, and she being under the direction of her husband, she very shortly afterwards transferred the principal to some one else. At all events, there never was the investment which the executors of this codicil were required to make ; the trust was not performed ; and I see nothing which can deprive her of her right to enforce it. Clearly, therefore, this sum must be brought into court.

Then comes the question, upon which there is some doubt in my mind. The dividends, which were to be paid, were to be for her sole and separate use ; and there are not only no direct words, but there are no words at all, that any fetter was intended to be imposed on this property. The question is, whether the way in which she dealt with this fund, disposing of these dividends to which she was entitled for her own use, can be sustained. If a woman could not dispose of property vested in other persons for her sole and separate use, without making express reference to that fact, there would be an end of the question. But, I apprehend, there are many ways in which a woman, having property for her separate use, may render it subject to her engagements without making any sort of reference to its being limited to her separate use.

The fund ought to be brought into court ; and there ought to be a direction to pay the dividends to her if she has not charged them ; if she has charged them, then to pay them to the party who has become so entitled to receive them ; and the fund being brought into court with that direction, there ought to be liberty to apply, on the youngest child attaining twenty-one, or dying under that age.

January 25.—His Lordship stated, that he had considered the question, whether the plaintiff was entitled to receive the dividends until her youngest child attained twenty-one, and that he was of opinion, that she was empowered to make a valid disposition of those dividends, and having done so, she was not entitled to this part of the relief prayed by the bill.

L.C.
 Nov. 19, 20, 1840. } RAWSON v. SAMUEL.
 Jan. 25, 1841. }

Set-off—Action at Law—Mercantile Accounts and Transactions—Injunction—Cross Demand.

The Court will not restrain proceedings in an action at law to recover damages for breach of a contract, until an account of the mercantile dealings and transactions had between the parties, shall have been taken in a suit in equity, instituted by the defendants at law, and the result of such account shall have been ascertained.

The mere existence of a cross demand, on the part of the plaintiffs against a defendant, is not a sufficient ground to restrain the defendant in equity, from taking out execution on a judgment recovered by him in an action for damages, against the plaintiffs in equity, until after an account shall have been taken in equity between the parties.

The plaintiffs in equity, in such a case, must, for the purpose of the injunction sought by them, establish from admissions contained in the answer of the defendant, or from documents produced by him, the case made by their bill.

The plaintiffs were merchants, and carried on business in London, under the firm of Rawson & Co., and the defendant was a merchant at Glasgow. In the year 1835, an arrangement was come to between the parties, by the terms whereof it was agreed, that the defendant should ship articles of merchandise on his own account, and consign them to the agents of the plaintiffs, conducting their business at certain houses abroad; and that the plaintiffs, on being advised by such agents of the arrival of the merchandise, were to accept bills drawn upon them by the defendant for the amount at which the same was shipped by him. Some time after the date of the arrangement, merchandise was shipped by the defendant, and consigned to the plaintiffs' agents, and bills of exchange for the amount of the merchandise were drawn by the defendant, and duly accepted by the plaintiffs; but afterwards the plaintiffs declined to accept other bills of exchange, which were drawn by the defendant upon the plaintiffs, in respect

of subsequent consignments of merchandise of considerable amount, made by him, to the agents of the plaintiffs, the plaintiffs insisting that they were greatly in advance with the defendant, and that the prices charged by the defendant on the merchandise consigned were excessive, and far beyond the market price. The refusal of the plaintiffs to accept the bills drawn by the defendant caused him to become embarrassed in circumstances, and the defendant immediately commenced an action against the plaintiffs to recover damages in respect of the breach of the agreement so entered into as aforesaid, between the parties; the plaintiffs, therefore, filed their bill in equity, seeking an account of the dealings and transactions between them and the defendant, a discovery and production of all debts, accounts, books, papers, and writings, and praying an injunction against the defendant's proceeding in his action at law to recover damages.

On application made by the plaintiffs to the Vice Chancellor, his Honour allowed the action at law to proceed to judgment, but stayed all proceedings on the judgment. The defendant now moved to discharge the order of his Honour.

Mr. Wigram and Mr. Hull, for the defendant.

Mr. K. Bruce, Mr. Jacob, and Mr. Blunt, contra.

The material cases that were cited to the Court, and the arguments of counsel, are mentioned in his Lordship's judgment, which was as follows:—

THE LORD CHANCELLOR.—The mercantile arrangement between the plaintiffs and the defendant, which has led to the existing litigation both at law and in equity, was, as far as regards the question before me, shortly this:—The defendant Samuel was to send out goods to several houses in distant parts, connected with the plaintiffs' house in this country, who were to sell and to remit the proceeds to the plaintiffs, and they were to accept bills drawn on them by the defendant, on the shipment taking place. The result was, the plaintiffs became largely in advance, the bills becoming due, and being paid by them before remittances or consignments were received by them from abroad to meet them. The

plaintiffs allege, that this arose in a great degree from the misconduct of the defendant in drawing bills upon them for larger sums than the value of the goods shipped justified, and in directing the houses abroad not to sell, and in refusing to renew the bills; but however that may turn out in the progress of the cause, I do not find in the answer any admission which can, on this motion, enable the plaintiffs to proceed upon the ground, that any of these allegations are so established as to entitle them to any order founded upon their being true; but it is admitted, that there is a complicated account to be taken between the plaintiffs and the defendant. Upon the result of this, however, the defendant says, he believes a balance will be found due to him. The subject of the action at law is the refusal of the plaintiffs in England to accept bills drawn by the defendant in pursuance of the agreement upon certain shipments made to the houses abroad. The Vice Chancellor's order permits the trial of this action, but restrains the execution, in case a verdict should be found for the plaintiffs at law. The case therefore is this: the plaintiffs in equity having broken their contract, and improperly refused to accept the bills, ought the defendant in equity, who has obtained a verdict and compensation for such a breach of contract and consequential injury, to be restrained from receiving the sum so awarded to him, until the complicated account stated in the bill shall have been taken, and the balance ascertained? This would produce the most obvious injustice, if the balance should be found in favour of the plaintiff at law, which he has sworn he believes it will. Whatever weight may be attached to this statement or belief, as to the balance of a long and complicated account, the case is certainly not one in which the plaintiffs in equity can ask the Court to assume, that the balance will be in their favour. Their equity, therefore, must rest on the admitted existence of a complicated and unsettled account. It was said, the subject of the suit in this court, and of the action at law, arose from the same contract; but the one is for an account of transactions under the contract, and the other is for damages for the breach of it; the object

and subject-matter are therefore totally distinct: and the fact, that the agreement was the origin of both, does not form any bond of union for the purpose of supporting an injunction. The question then comes to this, is the defendant in a suit in this court for an account, the balance of which I will suppose to be uncertain, to be restrained from taking out execution in an action for damages against the other parties to the account, until after the account shall have been taken; and it shall thereby have been ascertained that he does not owe to the defendant at law, on the balance of the account, a sum equal to the amount of damages? If so, it cannot be on the ground of set-off, because there is not at present any balance against which those damages can be set off; nor can it be because the damages are involved in the account, for certainly they form no part of it. We speak merely of equitable set-off, as distinct from set-off at law; but it will be found, equitable set-off exists in cases where the party seeking the benefit of it, shews some equitable ground for being protected against his adversary's right. The mere existence of a cross demand is not sufficient, as appears from *Whyte v. O'Brien* (1), though it is difficult to find any other ground for the order, in *Williams v. Davies* (2), as there reported. In the present case, there are not even cross demands; and it cannot be assumed, the balance of the account will be found to be in favour of the defendants at law. Is there, then, any equity in preventing a party, who has recovered damages at law, from receiving them, because he may be found to be indebted on the balance of an unsettled account to the party against whom the damages have been recovered?

Supposing the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due from the defendant at the time of their verdict, and their verdict may be no compensation for the additional injury which the delay in payment may occasion.

What equity has the plaintiff in a suit for an account to be protected against the

(1) 1 Sim. & Stu. 551.

(2) 2 Sim. 461.

damage awarded against him? If he has no such equity, there can be no good ground for the injunction.

Several cases were cited in support of the injunction; in every one of them excepting *Williams v. Davies*, it will be found the equity of the bill impeached the title to the legal demand. In *Beasley v. Darcy* (3), a tenant was entitled to redeem his lease on payment of the rent due, and on ascertaining the amount of such rent, a sum was deducted, which was due to the tenant from the landlord, for damage done in cutting the timber; both were ascertained sums, and the equity against the landlord was, that he ought not to recover possession of the farm for non-payment of the rent, while he owed to the tenant damages in respect of the same farm.

In *O'Connor v. Spaight* (4), the rent formed part of an existing account, and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease. In *Ex parte Stephens* (5) the term equitable set-off is used, but the note having been given under a misrepresentation, and a concealment of the fact, that the party to whom it was given was at that time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Piggott v. Williams* (6), the complaint against the solicitor for negligence, given generally to impeach the demand. In *Candor v. Lewis* (7), the proposition is too largely stated in the marginal note; for in that case, the action for mesne profits was brought against the plaintiff, who was held as against the defendant to be in equity entitled to the land. None of those cases furnish grounds for the injunction in the case before me. In *Preston v. Strutton* (8), the pendency of an unsettled partnership account, in which the balance was in dispute, was held to be no ground for an injunction to restrain the execution on a judgment, which had been obtained, on a note given for a balance on a former settlement.

(3) 2 Sch. & Lef. 403, n.

(4) 1 Ibid. 305.

(5) 11 Ves. 24.

(6) 6 Mad. 95.

(7) 1 You. & Col. 427; s. c. 4 Law J. Rep. (N.S.) Exch. Eq. 59.

(8) 1 Anstr. 50.

When this case was before me in 1838, as reported in 8 *Law J. Rep.* (N.S.) Chanc. p. 71, the plaintiffs had not then had all the discovery they required. I am there reported (9) to have said, "The Court must be satisfied how the evidence stands as applicable to the points stated in the bill, before it can safely dispose of the question, whether the action shall proceed, all of which will be open to the Court, when it is satisfied the plaintiffs have had the opportunity for the investigation which they ask. If they find nothing to bear on the issue, the result will be accordingly." It never occurred to me, if the plaintiffs were not able, from admissions in the answer, or from documents produced by the defendant, to establish, for the purpose of the injunction, the case made by the bill, that they could restrain him, by the mere fact of the pendency of the account. The case, however, is now reduced to that; and that will not, I think, justify the order appealed from, which must therefore be discharged, and the motion for the injunction refused, with costs.

M.R. }
Jan. 28. } *MAYER v. TOWNSEND.*

Will—Construction.

A testator bequeathed the residue of his personal estate to trustees, upon trust, to raise therefrom 5,000l. for his daughter E., and to place out his said daughter's legacy at interest, and pay the dividends to her during her life, for her separate use; and, after her decease, he bequeathed the legacy so given to her to her children. And he authorized her, if she married, to appoint the interest to her husband for his life, if he survived her. And if his personal estate should not be sufficient to raise the legacy so given to his said daughter, then he authorized it to be raised out of certain real estates. By a deed of appointment, of even date with the will, the testator and his wife charged certain other real estates with 1,950l., in favour of their said daughter, upon the same trusts as were expressed in the will, with an ultimate gift over, in de-

(9) P. 75.

fault of children, to the daughter absolutely. And by a codicil, also of the same date, after reciting the appointment, the testator directed that this 1,950l. should be taken as part of the legacy given to her by the will, and charged the residue on certain real estate. The testator's personal estate was exhausted by the payment of his debts. The daughter died unmarried:—Held, that she took an absolute interest, not only in the 1,950l. appointed by the deed, but also in the remainder of the 5,000l. given by the will.

Robert Lawrence Townsend, by his will, dated the 7th of June 1830, after bequeathing some specific legacies, bequeathed the residue of his personal estate (except such part as might consist of land) to two trustees, upon trust, after paying his debts and testamentary expenses, that they, the two trustees, and the survivor of them, his executors and administrators, should raise therefrom a sum of 5,000l. for his daughter, Elizabeth Lawrence Townsend, and, as soon as he or they might have obtained the same, upon trust, to place his said daughter's legacy at interest, on government or real security, and pay the dividends to arise thereby to his said daughter, during her life, for her separate use. And after her decease (subject nevertheless to the proviso therein-after contained), he bequeathed the legacy so thereinbefore given to her by him, to be equally divided between her children, share and share alike; and, if there should be only one such child, then the whole to such only child, his executors, or administrators: provided always, and the testator declared that it should be lawful for his said daughter, provided she should marry, to direct his said trustees, and the survivor of them, his executors, and administrators, to pay the interest of the said sum of 5,000l. so given by him, to her husband during his life, in case he might outlive her. And, if his personal estate should not be adequate to raise the legacy so thereby given by him to his said daughter, then the testator devised certain real estate to the two trustees, for a term of years, to raise the said sum. And he gave 2,000l. to another of his daughters, upon whose marriage he had agreed to give her 5,000l.,

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but had only actually paid 3,000l. The testator also executed a codicil, of the same date as his will, and thereby recited that, since executing his will, he had discovered that he and his wife jointly had a power of charging certain real estates with 2,000l., as a portion for younger children, and that, by an indenture of even date therewith, they had charged the said estates with a sum of 1,950l., in favour of the said Elizabeth Lawrence Townsend; and the testator then declared, that the said sum of 1,950l. should be considered as part of the legacy given to her by his will; and he charged the residue on his estate at B. (which estate he had devised to his son William L. Townsend), and he devised the same estate to the two trustees for 1,000 years, to raise the legacy by mortgage.

By an indenture of appointment, of even date, the testator and his wife appointed and directed that 1,950l. should be raised and paid to the two trustees named in his will, upon the same trusts as were declared by the will, of the 5,000l.; and subject to these trusts, the trustees were to stand possessed of this sum of 1,950l., in trust for the said Elizabeth Lawrence Townsend, her executors, administrators, or assigns.

The testator died in June 1830, and his personal estate was exhausted by the payment of his debts, and funeral and testamentary expenses.

Elizabeth L. Townsend died unmarried, in December 1838, having made her will in December 1836, and thereby bequeathed the said sum of 5,000l. to the plaintiff Samuel Mayer, upon certain trusts.

The sum of 1,950l., which was the subject of the deed of appointment, had been paid to the plaintiff, but the remaining sum of 3,050l. had not been paid, but the interest upon it had been duly paid up to the death of Elizabeth L. Townsend.

The bill was filed against William L. Townsend and the two trustees; and it prayed a declaration that Elizabeth Lawrence Townsend became absolutely entitled to the legacy of 5,000l., and that 3,050l. and interest thereon since the death of Elizabeth L. Townsend, might be raised by sale or mortgage of the estate devised to William L. Townsend.

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Mr. Tinney, Mr. Pemberton, and Mr. K. Parker, for the plaintiff, contended that, under the will, the testator's daughter took an absolute interest in the trust fund, in the event of her not having any children, who could take by virtue of the trusts created in their favour: that the 1,950*l.* appointed by the deed, was expressly limited to her in case the contingent interests before mentioned did not take effect, and that that sum was to form part of the 5,000*l.*, and that the testator spoke of the whole sum as "her legacy."

Mr. G. Turner and Mr. Parry, *contrà*; insisted that the will only gave a direction to raise this sum and apply it in a certain manner; and that, as the trusts mentioned in the will had failed, the trust fund was undisposed of, except as to the 1,950*l.* appointed by the deed.

Cook v. Fountain, 3 Swanst. 591.

Hewitt v. Wright, 1 Bro. C.C. 86.

The MASTER OF THE ROLLS said, that the legacy to the daughter was not, strictly, an absolute gift; but that it was only subject to those particular restrictions which the testator had in contemplation: that it was not necessary to decide whether, if the legatee had married, and had had no children, her husband would have been entitled to this fund. But his Lordship was of opinion that the restrictions of the will ought not to be carried further than the expressions of the will required; and that, under the circumstances, the plaintiff was entitled to the decree which was asked.

M.R. }
Jan. 19. } WEST V. SMITH.

Practice.—Costs.

A party gave notice of a motion to discharge an order with costs, and obtained an order accordingly:—Held, that these costs included the costs of the motion to discharge the prior order.

The Master of the Rolls made an order on the 24th of November 1840, which the parties who were affected by it gave notice of a motion to discharge, *with costs*.

On the 22nd December 1840, *Mr. Pem-*

berton obtained an order from the Master of the Rolls, that the order in question should be discharged, *with costs* to be taxed by the Master; such costs, when taxed, to be paid by one of the plaintiffs. Under this order, the parties on whose behalf the application was made, contended, that they were entitled to the costs of the motion to discharge the prior order.

The matter was mentioned by *Mr. Pemberton* to the Master of the Rolls, when *Mr. Tennant* contended, that although the parties were entitled to the costs of the order which was discharged, they were not entitled, upon such a notice of motion as had been given, to the costs of the application which was made to discharge it.

The MASTER OF THE ROLLS held, that the costs of the motion to discharge the order must be paid, as well as any other costs occasioned by it.

V.C. }
Dec. 9, 1840; } WALKER V. THOMASON.
Jan. 21, 1841. }

Injunction Bill—Patent—Motion for Trial at Law—Lapse of Time.

In a suit to restrain the infringement of a patent, the plaintiff may, on motion, obtain liberty to proceed to try the question at law, notwithstanding the cause in equity is at issue, if publication has not passed.

The bill in this case prayed an injunction to restrain the sale, by the defendant, of an engine or self-acting apparatus for cleansing beer, for which the plaintiff alleged that he had obtained a patent.

The bill was filed in September 1838, and the answer was filed in October following. No further proceedings were taken in the cause until the month of May 1839, when the defendant moved to dismiss the bill for want of prosecution, and the plaintiff entered into the undertaking to speed, and filed his replication. The parties consented that publication should be enlarged until the last day of Michaelmas term, 1840; and, six days before publication would peremptorily pass, the plaintiff moved that he might be at liberty to bring

an action at law, for the purpose of determining the question of the infringement of his patent.

Mr. Sharpe, for the motion.—If the plaintiff had proved the entire case on which he relies, and the cause came on to be heard, the Court must still do what is now sought.

Mr. Puller, *contra*, insisted, that the motion was made too late, and that the cause was set down, and must now be brought to a hearing.

December 9.—The VICE CHANCELLOR directed the motion to stand over until the fact was ascertained, of whether publication in the cause had or not passed at the time the motion was agreed to be taken as having been made.

Jan. 21, 1841.—The motion was again mentioned.

Mr. Sharpe, for the plaintiff.

Mr. Phillipps, for the defendant.—It appeared that publication had not passed.

The VICE CHANCELLOR made the order.

V.C. }
MAR. 1, 2. } CROSS v. BEDINGFIELD.

Evidence—Jurisdiction—Lost Bond—Admission by a Joint Obligor—Annuity—Interest—Statute 3 & 4 Will. 4. c. 42. s. 28.

In a suit against two obligors, in a joint and several bond, the admission in the answer of one obligor, that the bond was destroyed, is evidence which may be received, and will support the jurisdiction of the Court to decree payment as against both.

In a suit upon a bond, given to secure an annuity, the Court may decree payment of the arrears of the annuity, with interest from the respective times at which it became due; but not beyond the amount of the penalty of the bond.

The statute 3 & 4 Will. 4. c. 42. s. 28, giving interest on "debts or sums certain," does not apply to such a case.

In the year 1818, Thomas Bayly, who had many years practised as a surgeon and apothecary at Stowmarket, admitted J. Bedingfield into partnership with him in

such business, for a term of five years, in consideration of a sum of 500*l.*, with an agreement that at the expiration of that time, Bayly should wholly retire from the business, in consideration of an annuity of 50*l.* for his life, to be thenceforward paid to him by Bedingfield. In August 1822, upon the retirement of Bayly, the defendant, J. Bedingfield, and his mother Susan Bedingfield, executed their joint and several bond, in the penal sum of 500*l.*, conditioned for the payment to Bayly of the said annuity of 50*l.* during his life, by half-yearly payments. It was also agreed, that Bayly should enter into a bond with Bedingfield, with a like penalty, not to practise within ten miles of Stowmarket, after the expiration of the said term, until the annuity should be in arrear one year; but this bond was not executed. J. Bedingfield paid the annuity of 50*l.* until November 1824. The defendant, Susan Bedingfield, gave her promissory notes for the payment of 500*l.*, which was the consideration of the partnership agreement, by instalments. Bedingfield was dissatisfied with the conduct of Bayly, in carrying into effect the dissolution, and also complained of misrepresentation in the accounts he had received, prior to the partnership, of the profits of the business. Mrs. Bedingfield, about November 1825, paid to Bayly the last instalment of the 500*l.*, for which she had given her promissory notes; and she stated by her answer, that upon this occasion, on leaving the house of Bayly, he put into her hands the bond given to secure the annuity, and with a peculiar meaning in the expression of his countenance, said, "Mrs. Bedingfield, as soon as you get home burn this." She accordingly burnt it on her return, as she stated, in the full persuasion that Bayly had then determined to perform a just act, and to relieve herself and her son from the payment of the annuity, which they had been induced to grant in the manner complained of. A few days afterwards, Bayly and his solicitor called on Mrs. Bedingfield, and said, that the bond had been given to her by mistake, instead of the promissory note then paid, and requested she would execute another bond to the same effect, which she refused to do; believing there had been no such mistake, and that Bayly had after-

wards repented of delivering up the bond, or had been instigated by other persons to require the execution of another instrument. A few days afterwards, Mrs. Beddingfield, by a letter to Mr. Bayly's solicitor, admitted that the destruction of the bond was an accident, and added that she would never mention the affair to her son, and "therefore the annuity is as secure as ever." Some communication afterwards took place, and proposals were made for a compromise, but none was agreed to, and no further payment of the annuity was made. Bayly died in 1834, having appointed his wife and the plaintiff his executrix and executor. The widow died in 1835, and the bill was filed in 1837, against Mrs. Beddingfield and J. Beddingfield, and prayed, that if the bond had not been destroyed, and was in the defendant's possession, it might be delivered up, and that an account might be taken of what was due in respect of the arrears of the annuity and the interest thereof, and that the defendants might be decreed to pay what should be so found due.

Mr. K. Bruce and *Mr. Koe*, for the plaintiff.

Mr. G. Richards and *Mr. Pitman*, for the defendants.

On the principal question, as to the title of the plaintiff to sustain the suit, the following authorities were cited:—first, on the jurisdiction in equity:—

East India Company v. Boddam, 9 Ves. 464.

Whitchurch v. Golding, 2 P. Wms. 541. *Anon.* 3 Atk. 17.

Dormer v. Fortescue, *ibid.* 132.

Ex parte Greenway, 6 Ves. 812.

Mossop v. Eadon, 16 *ibid.* 430.

Whitfield v. Fausset, 1 Ves. sen. 388.

Macartney v. Graham, 2 Sim. 281; s. c. 9 Law J. Rep. Chanc. 198.

Secondly, on the legal liability:—

Rose v. Poulton, 2 B. & Ad. 822; s. c. 1 Law J. Rep. (n.s.) K.B. 5.

Seagrave v. Seagrave, 13 Ves. 439.

Hansard v. Robinson, 7 B. & C. 90; s. c. 5 Law J. Rep. K.B. 242.

On the question whether the alleged breach of the articles of dissolution by the

obligee of the bond, was a matter of defence to the suit upon the bond:—

Stavers v. Curling, 3 Bing. N.C. 355; s. c. 6 Law J. Rep. (n.s.) C.P. 41.

Mattock v. Kinglake, 10 Ad. & El. 50; s. c. 8 Law J. Rep. (n.s.) Q.B. 215.

On the question whether, there being no other proof of the loss or destruction of the bond than the admission in the answer of Mrs. Beddingfield,—the decree could upon that evidence be made against both defendants:—

Gilb. Evid. p. 57.

Whitcomb v. Whiting, 2 Doug. 652.

Perham v. Raynal, 2 Bing. 306; s. c. 2 Law J. Rep. C.P. 271.

Wyatt v. Hotson, 8 Bing. 309; s. c. 1 Law J. Rep. (n.s.) C.P. 93.

Burleigh v. Stott, 8 B. & C. 36; s. c. 6 Law J. Rep. K.B. 232.

Pritchard v. Draper, 1 Russ. & Myl. 191, 199.

Nottidge v. Prichard, 8 Bligh, 493, 521.

Saltern v. Melhuish, Amb. 247.

The VICE CHANCELLOR. — The statements and evidence given by the defendants, in proof of the allegation, that Mr. Bayly practised in his profession after the dissolution of the partnership, and contrary to his agreement, which formed the consideration for the annuity, are only important so far as they relate to alleged instances of his having practised before the annuity became more than one year in arrear. It appears to me, that the parties contemplated the possibility of the annuity not being paid, and provided for that event by giving the party who had given up his practice the liberty of renewing it, without, however, losing his right to recover the annuity; for it is obvious, that a medical man having once given up his practice to another, and discontinued his business, cannot, or at least cannot be presumed to have the means of resuming his employment, so as to place himself again in his former situation. I, therefore, confine my attention to those cases which are alleged to have happened before the annuity was in arrear for more than the year; and I also disregard the evidence with respect to those patients who are not named in the answer, and with

regard to whom the plaintiff had therefore no means of shewing any circumstances which might have explained the facts referred to.—[His Honour then read such parts of the evidence as related to cases in which it was alleged Mr. Bayly had acted in his professional capacity contrary to the agreement; and concluded by holding, that no breach of covenant in that respect had been proved.]—It has been contended, that there is no sufficient proof of the destruction of the bond, as against the defendant J. Bedingfield the son; but it seems to me, that it is impossible for the defendants to state the case on which they rely without admitting the fact, that the bond has been destroyed. Suppose that one of the defendants, who were joint obligors, had admitted the possession of the bond, the Court might certainly in that case have made a decree against both. It is not denied, that the admission in this case is a sufficient foundation for a decree against Susan Bedingfield, assuming that she is in other respects liable; and this being so, on what ground can it be suggested that the decree can only be made against one defendant, when the liability, if it exist at all, must be joint? The issue raised, in fact, is, not that the bond is not destroyed; but whether it was not destroyed under other circumstances than those which the plaintiff has alleged. This Court has unquestionably a jurisdiction in case of lost instruments, which is not affected by the alterations in pleading at law. The decision in the case of *Mossop v. Eadon*, I well remember, was never considered to be satisfactory. I think this case has been sufficiently established to entitle the plaintiff to a decree.

[The case was then discussed with reference to the terms of the decree.]

Mr. K. Bruce insisted that the account of the annuity in arrear and unpaid should be taken, with interest at 4l. per cent., from the respective times at which the annuity was due; and that the decree for payment ought not to be limited to the amount of the penalty of the bond. The plaintiff might take either of two grounds: he might insist upon the agreement for the annuity, and use the bond only as evidence of that agreement; or he might insist on his legal title to the penalty of the bond,

as a sum due at the time the defendants first made default in payment of the annuity, and thenceforward bearing interest under the act 3 & 4 Will. 4. c. 42. s. 28, and then he would be entitled to payment of the arrears of the annuity and interest, not exceeding the penalty of the bond and interest; or the Court might decree payment of the whole interest due, upon the authority of the statute, without reference to the penalty.

Jeudwine v. Agate, 3 Sim. 129.

Logan v. Wienholt, 1 Cl. & F. 610.

Hyde v. Price, 3 Ves. 437.

Mr. G. Richards, *contra*.—The plaintiff cannot sue upon a bond, and then treat it as an agreement,—nor is the penalty of a bond, given to secure an annuity, “a debt or sum certain,” within the statute giving interest.

The VICE CHANCELLOR.—I do not recollect any case of an action upon an agreement, supported by a bond given to secure the performance of it, as distinct from the common action of debt upon the bond. It would be a new thing for the Court to construe the bond as an agreement. Looking at the words of the statute, I certainly do not think that the case of a bond in the common form, with a penal sum, is within the 28th section. The arrears of the annuity must be computed, with interest, not exceeding the penalty of the bond.

V.C. }
Mar. 19. } COOPER v. FISHER.

Partition — Assignee of Parcel of an Undivided Share.

The assignee of an undivided share of certain premises, part of a larger estate, held by the assignor in common, has no title as against the other tenants in common to require that, on partition, the particular premises which he has purchased, or any part of them, shall be allotted to him.

This was a bill for partition. An undivided moiety in a specific part of the estate had been purchased by and conveyed to one of the defendants, who had no interest in the other parts of the estate.

Mr. Freeling, for the defendant, interested only in the premises, of which a share had been assigned to him, submitted, that special directions should be given that in making the partition the commissioners should have regard to those parts of the estate in which such defendant was interested. If some directions of this nature were not given, the partition might have the effect of precluding him from having the moiety of those portions of the estate which he had purchased.

Mr. K. Bruce and *Mr. Piggott*, for the bill.

The VICE CHANCELLOR.—The alienee of part of an undivided estate, must take his interest, subject to a bill of partition being filed against him. If persons deal in such interests as undivided shares, they do so with the liability of having something assigned to them different from what they might originally possess. There is no ground for any special direction in the decree, with reference to this circumstance.

V.C. }
Feb. 10. } REECE v. HUMBLE.

Practice.—Common Injunction.

After the expiration of eight days from the filing of an injunction bill, without appearance by the defendant, the plaintiff may immediately obtain the common injunction, notwithstanding it be in vacation, and neither a seal day nor a day to which the seal has been adjourned.

Eight days had elapsed since the bill, which sought to restrain proceedings at law, had been filed, and the defendant had not appeared. The last preceding seal was on the 8th of February, when the eight days had not expired. That seal had not been adjourned; the ensuing seal would be on the 22nd of February.

Mr. Glasse moved for the common injunction; and mentioned *Brierley v. Walmsley* (1).

Mr. K. Bruce, *amicus Curiae*, said, it had been the practice for several years past to

grant the common injunction, without reference to the circumstance that the motion was not made on a seal day.

The VICE CHANCELLOR.—The order for the common injunction, under such circumstances, has repeatedly been made. Owing to the great increase of business, it is impossible to transact in one day the whole of that technical business which formerly used to be completed on a seal day. It has latterly been the practice to make the order for the common injunction on any day after the expiration of eight days from filing of the bill.

V.C. }
March 8. } UPTON v. LOWTEN.

Practice.—Title of Answer—Notice of Motion—Costs.

Answer intituled, "the answer of A to the original bill of B, since deceased," irregular, and taken off the file.

Costs refused upon a motion, where the notice was entitled in a cause, "by bill of revivor," and the bill was properly of revivor and supplement.

The plaintiff, in the original bill, died before the defendant had answered; and a bill of revivor was filed, stating the death and the devolution of interest upon the plaintiff in the bill of revivor, and praying the usual order to revive, and that the defendant might answer the original bill as well as the bill of revivor. The defendant put in his answer, intituling it, "The answer of A to the original bill of B, since deceased."

Notice of motion was given, that the answer might be ordered to be taken off the file. The notice was intituled in both causes, adding the words, "by bill of revivor." It was said, that an indictment for perjury would not lie upon the contents of an answer so described.

Vigers v. Lord Audley, 9 Sim. 408; s. c. 8 Law J. Rep. (N.S.) Chanc. 15.

Sayle v. Graham, 5 Sim. 8.

The VICE CHANCELLOR ordered the answer to be taken off the file as irregularly intituled, but without costs, on the ground that the notice of motion was informal,

(1) 1 Keen, 141; s. c. 5 Law J. Rep. (N.S.) Chanc. 151.

in containing the words, "by bill of revivor," when the bill was properly a bill of revivor and supplement.

V.C. }
March 9. } CASTELLAIN v. BLUMENTHAL.

Practice.—Injunction—Shewing Cause—Affidavits.

Upon shewing cause against dissolving the common injunction, the plaintiff is not permitted to read affidavits in proof of facts, of which the answer states that the defendant is ignorant.

Upon shewing cause on the merits against the dissolving of the common injunction, the plaintiff tendered affidavits in proof of some facts relating to the cause of action, which the defendant, in his answer, had neither admitted nor denied, but had stated that he was entirely ignorant of.

Mr. Jacob, for the defendant, objected to the reading of such affidavits, on the ground that they could only be admitted to shew actual waste, or to prove documents, which the answer, without denying, did not admit.

Mr. K. Bruce and Mr. L. Wigram, for the plaintiff.—The Court will receive information, by affidavit, with regard to matters which are stated to be unknown to the defendant, but which he does not dispute. There is no reasonable ground for confining this rule to the single case of what is termed waste, or to the proof of documentary evidence. If the plaintiff in equity can shew an important fact, rendering it plainly inequitable that the defendant should proceed in his action at law, and the defendant does not negative the existence of such a fact, upon what principle does the distinction rest, which would admit affidavits in proof of that fact, if it was committed to writing, but exclude them if it rests on memory? For the purpose of this argument, it must be assumed, that the fact to be shewn would establish the plaintiff's title to sustain the injunction.

The following cases were cited,—

Morgan v. Goode, 3 Mer. 10.

Hodgson v. Dean, 2 Sim. & Stu. 221 ;
s. c. 3 Law J. Rep. Chanc. 95.

Barrett v. Tickell, Jacob, 155.

The VICE CHANCELLOR.—I certainly thought that this point was perfectly settled. I have always understood that, with the exception which has been mentioned, with regard to the admission of documents, a party who moves upon the answer is bound by the answer. This is, in fact, not merely a motion upon the answer, but the plaintiff has undertaken to shew an equity confessed upon the answer. Sir John Leach seemed to suppose that the mere accidental omission of a party to state facts, which he supposed he had stated, might be supplied by affidavit; but Lord Eldon, speaking of his recollection, said, that the exception to the rule was not carried further than that if deeds or letters were stated in the bill, and the defendant says, he does not know whether the statement is correct or not, they may be verified by affidavit; but as to facts and circumstances, if you cannot have the benefit of them from the defendant's answer, you cannot have the benefit of them at all, except so far as you may be able to prove them at the trial. The point has been discussed three or four times, and I thought it was so firmly settled, that it was not likely to be brought into question again. The affidavits cannot be admitted.

HATCH v. LEE.

In re 9 Geo. 4, intituled "An act to consolidate and amend the laws relating to savings banks."

V.C.
Mar. 23;
April 2.

In re 3 & 4 Will. 4, intituled "An act to enable depositors in savings banks and others to purchase government annuities, through the medium of savings banks, and to amend the act 9 Geo. 4."

Savings Bank Act, 3 Will. 4. c. 14. s. 28,
Construction of—Debt of Treasurer of Savings Bank—Administration Suit—Petition—Costs.

Under the act, 3 Will. 4. c. 14. s. 28, the Court will, on petition, order payment of a debt due to a savings bank, from the treasurer of such savings bank, out of the first monies to be received, before any report made,

in a suit for the administration of the estate of such treasurer; but the Court will not make any order for the payment of the costs of the petition.

The petitioners were the trustees of a savings bank, called the "Guildford Provident Bank for Savings, and Annuity Society," established in the year 1816, and carried on pursuant to the regulations of the statutes relating to savings banks. On the 15th of December 1828, W. Sparkes, a banker of Guildford, was, under the provisions of the first act of parliament, duly appointed treasurer of the savings bank and annuity society, and he acted as such treasurer until the time of his death. W. Sparkes died in October 1840, and, at the time of his death, had in his hands as such treasurer, by virtue of his office, 1,432*l.* 8*s.* 9*d.*, being the balance of money and effects then belonging to the savings bank and annuity society. The will of W. Sparkes was proved by two of his executors, and a creditors' suit instituted for the administration of his estate, in which suit a receiver of the real and personal estate was appointed in December 1840, and the usual decree for an account of the debts and assets soon afterwards made. The petition was now presented by the new treasurer and the trustees of the savings bank and annuity society, and prayed, that the defendants, the executors, might be directed to pay out of the estates or assets of W. Sparkes, in their hands, or if there be none such, or not sufficient to answer the petitioners' demand, then that the receiver appointed in the cause might be ordered out of the first monies which should come to his hands, in respect of the estate, effects, or assets of W. Sparkes, to pay to the petitioner, the new treasurer, the balance or sum of 1,432*l.* 8*s.* 9*d.*; and that the costs of, and incident to the application, might be borne and paid by and out of the estate of W. Sparkes.

Mr. Bacon, for the petition, relied on the stat. 3 Will. 4. c. 14. s. 28 (1).

(1) This section enacts, "That if any person already appointed under the provisions of the said act, 9 Geo. 4, or who may hereafter be appointed to any office in a savings bank, or in a society established under this act, and being entrusted with

Mr. Teed, for the executors.

Mr. K. Bruce, for the plaintiff.

The act has only given this debt a priority to all others, and does not enable these petitioners to come in a summary manner for payment, before anything has been done in the administration of the estate. They should have gone before the Master, with the other creditors, and the Court, on further directions, would have given them that priority to which they are entitled under the statute. The expenses of getting in the estate, and the costs of administration, are charges which must of necessity precede all others. The petition is premature. As to the costs of the petition, the petitioners can have no better claim to be paid their costs, than any judgment or bond creditor would have.

The VICE CHANCELLOR. — Upon the words of the act, I think it is proper to direct, that the debt shall be paid; but I cannot give the costs of the petition. The act directs, that the sum due shall be paid; but it contains no directions with regard to costs.

the keeping of the accounts, so having in his hands or possession by virtue of his said office or employment, any monies or effects belonging to such savings bank or society, or any deeds or securities relating to the same, shall die or become a bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or effects, or make any assignment thereof for the benefit of his creditors, his executors, administrators, or assigns, or other persons having legal right, or the sheriff or other officer executing such process shall, within forty days after demand, made by two of the trustees of the said savings bank or society as aforesaid, deliver and pay over all monies and other things belonging to such savings bank or society, to such person as the said trustees shall appoint, and shall pay out of the estate, assets, or effects of such person, all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, is paid over to the party issuing such process, and all such assets, lands, goods, chattels, estates, and effects, shall be bound to the payment and discharge thereof accordingly."

L. C. }
 Mar. 17, 24, 26. } MEUX v. SMITH.

Uncertificated Bankrupt — Contract — Equitable Mortgagee — Lien — Action at Law — Jurisdiction — Money had and received — Injunction — Practice.

*G. being the owner of a lease of certain premises, entered into an arrangement, by which A, an uncertificated bankrupt, (but not known to be so at the time,) agreed to take an underlease; and in order to enable A. to pay the consideration-money for it, he borrowed 1,000*l.*, part of the consideration-money, from M. & Co., and 1,000*l.*, another part thereof, from S. & Co. The underlease was executed by G. to A, and the assignees of A. claimed the underlease, on the ground that A. was only capable of acquiring property for the benefit of his assignees, and had no power as against them to create any interest in such acquired property. M. & Co. stated a contemporaneous contract between them and A, to the effect that the underlease, though taken in A's name, was to the extent of the money advanced by M. & Co. to A, to be for their benefit. An action at law having been brought against M. & Co. by the assignees of A, to recover the sum of 1,000*l.*, part of the proceeds arising from the sale of the property, the subject of the underlease, a bill was filed by M. & Co. against the assignees of A, to restrain the proceedings thereunder, and seeking a declaration of the plaintiffs' right to the 1,000*l.* advanced by them, in preference to the defendants' claim:—Held, that the plaintiffs being in possession of the subject-matter of dispute, and there being a fair case to be argued, and a question to be adjudicated on by the Court, it was the duty of the Court to protect the plaintiffs, and to give them the opportunity of making out the equity they had asserted, on their paying into court the amount sought to be recovered in the action, the same to abide the ultimate decision of the question between the parties.*

It is not the course of the Court, in a matter originally belonging to it, to permit a question of equitable lien upon a deposit of deeds, under a contract in writing, for that purpose, to be adjudicated on at common law, in the form of an action for money had and received.

NEW SERIES, X.—CHANC.

This was an appeal from the decision of his Honour the Vice Chancellor. The plaintiffs were Messrs. Meux & Co., the brewers. On the 13th of September 1838, James Gurney was possessed of the Dolphin public-house and premises situate in Whitechapel Road, for a term of sixty-three years, and carried on the business of a publican therein, and was at that time indebted to the plaintiffs in the sum of 1,000*l.*, for beer, &c., and also indebted to Messrs. Seager & Co., distillers, to the same amount, for goods supplied to him. Before the 13th of September 1838, James Gurney contracted with a person named Albin, a victualler, to sell to him the public-house called the Dolphin, and for that purpose to grant a lease of the public-house to Albin, for the whole of the term of sixty-three years, wanting ten days, at the yearly rent of 102*l.* 10*s.*, in consideration of the sum of 2,450*l.* Albin, being unable to pay the 2,450*l.*, applied to the plaintiffs and Messrs. Seager & Co., to advance him the sum of 1,000*l.* each, in order to enable him to complete the purchase, which they agreed to do; the two sums of 1,000*l.* each were accordingly advanced and paid by the plaintiffs and Messrs. Seager & Co., by means of cheques, to James Gurney, at the request of Albin, or to Albin himself, who immediately handed them to Gurney. The sum of 450*l.*, being the residue of the purchase-money, and the sum of 647*l.* 1*s.* 4*d.*, the value of the stock in trade, &c. were borrowed by Albin from different sources, and paid by Albin to Gurney. On the 13th of September 1838, an indenture of lease of that date was made between Gurney of the one part, and Albin of the other part, whereby Gurney demised the said public-house and premises to Albin, for the term of sixty-three years, wanting ten days, commencing from the 24th of June 1830. On the execution of the lease by Gurney, the same was delivered to the agent of the plaintiffs, who placed it for security in the plaintiffs' strong room, after he had procured the same to be registered by the registering officer for the county of Middlesex. Albin, on the 13th of September 1838, gave the plaintiffs a promissory note for the 1,000*l.* advanced by them to him, which was part of their secu-

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city, and on the same day signed a memorandum in writing, acknowledging the deposit of the lease, as a security for repayment of the two sums of 1,000*l.* each, and also for securing payment of all future sums to become due to plaintiffs and Seager & Co., for goods to be supplied, or money to be lent to him, or on any other account whatsoever, and undertaking to execute to plaintiffs and Seager & Co. an underlease of the premises, when required so to do, with powers of sale, power to give receipts, &c., and not to execute any transfer, assignment, &c. of the legal estate of the premises. It was then discovered that Albin was an uncertificated bankrupt; that the defendants, Smith, Reckless, and Hart, were in 1837 appointed his assignees, and that in the early part of 1838 he was discharged under the Insolvent Debtors Act. An arrangement was subsequently come to, by an agreement in writing, dated the 24th of September 1839, between the plaintiffs and Seager & Co., the assignees of Albin, and John Thorn, by which the Dolphin public-house and premises were agreed to be assigned to John Thorn, in consideration of the sum of 100*l.*, paid by him to the assignees of Albin, and 2,100*l.* paid to the plaintiffs and Messrs. Seager & Co., in equal shares, without prejudice to the rights of any of the parties, either at law or in equity, to the amount of the purchase-money.

In November 1839, an assignment of the public-house and premises was executed to Thorn by the plaintiffs and defendants, in pursuance of the agreement of the 24th of September 1839. Much discussion arose in court as to the effect of such agreement, which was signed by the plaintiffs and defendants, and was as follows:—“Memorandum—That although Messrs. John Smith, John Reckless, and David Hart, assignees of Leonard Albin the younger, formerly of Liverpool, but late of the Dolphin, Whitechapel Road, in the county of Middlesex, an uncertificated bankrupt, have, at the request of the other parties to a certain indenture not yet executed, bearing date the 7th of September inst., and made between the said assignees of the first part, Sir Henry Meux and Henry Neelson Smith, and Messrs. James Lys Seager, William Evans,

and Robert Stafford of the second part, and John Thorn of the third part, (whereby the said premises, called the Dolphin, are conveyed for the residue of a term of years, to the said John Thorn, in consideration of 2,200*l.*, that is to say, 2,100*l.* paid to the parties of the second part, and 100*l.* paid to the parties of the first part,) agreed to join therein, without raising on the face of such indenture any question as to whether the said assignees have, as between them and the parties of the second part, a right to such 2,100*l.*, or any part thereof, inasmuch as the said John Thorn objected to have the same appear on the said deed; yet nevertheless, it is hereby declared and agreed between the said parties of the first and second parts, that such indenture, and the concurrence of the said assignees therein, and in the payment over of the 2,100*l.* to the said parties of the second part, was and is expressly on the condition and understanding, that the same is without prejudice to any right or claim (if any) of the said assignees either at law or in equity, to such 2,100*l.*, or any part thereof, and that the fact of the execution of such indenture by the said assignees shall not prejudice any right whereof the said assignees were possessed before the date hereof, nor shall the signature by the said parties of the second part, to this memorandum, prejudice any right whereof they were possessed before the date hereof; and that in case of any proceedings hereafter either at law or in equity, or otherwise, between the said assignees and the said parties of the said second part, in respect thereof, the said indenture is not to be given in evidence, or used in bar or to the prejudice of any such right or claim, if any, of the said assignees: provided always, that this memorandum shall be delivered up to be cancelled, and the subject-matter of the said indenture to be considered finally settled, unless the said assignees shall, on or before the 1st day of January next, proceed to enforce some claim in respect of such 2,100*l.*, if they think fit so to do. Dated this 24th day of September 1839.”

In December 1839, the assignees of the bankrupt commenced an action on promises in the Court of Exchequer, against the plaintiffs, to recover the sum of 1,050*l.*,

as money had and received by the plaintiffs in equity, to the use of the defendants, the assignees. The bill charged, that the plaintiffs were entitled, under the circumstances stated, to stand in the place of Gurney as to the sum of 1,000*l.*, as being purchasers from him of the lien, to which he would have been entitled, upon the premises, in case the sum of 1,000*l.* had not been paid to him; and that even if the plaintiffs were not entitled to stand in the place of Gurney, in respect of his lien, yet they were entitled to a lien upon the public-house and premises, for the sum of 1,000*l.* and interest, in preference to the claim of the defendants, the assignees; and that the defendants were not entitled to take the property, or to receive the purchase-money for the same, except subject to the plaintiffs' said lien, or without discharging or satisfying what was due to the plaintiffs, in respect of the said sum of 1,000*l.* and interest.

The bill prayed a declaration of the plaintiffs' right to a lien for the sum of 1,000*l.*, and interest thereon, and that the plaintiffs were entitled to receive and retain the same out of the proceeds of the sale of the premises, and that the defendants might be restrained from proceeding further in the action already commenced by them.

The VICE CHANCELLOR, on application to him on the part of the plaintiffs, granted an order, restraining the defendants from further proceedings in the action, the plaintiffs undertaking to deal with the 1,000*l.* as the Court should direct.

Mr. Jacob, Mr. Wigram, and Mr. W. C. L. Keene, appeared in support of an appeal from the decision of his Honour.—The plaintiffs, who claim through a written instrument, viz. the underlease executed to Albin by Gurney, at a time when Albin was an uncertificated bankrupt and insolvent, can have no title to the property, because Albin could have taken no interest except for the benefit of his creditors, through his assignees. The courts of law investigate equitable contracts every day, and the defendants in the action at law might have set up an equitable defence if they had chosen. The plaintiffs, however, do not derive the property from Gurney, but from Albin, although they might have derived it from Gurney if they had been

pleased to do so. The answer states, that the deed of assignment, when executed, was immediately placed in the hands of Albin, and then handed by Albin to the agent of the plaintiffs; and if such be the case, there can be no question how the transaction operated. The only points for the consideration of the Court are, what is the contract between the parties? and, what are the circumstances consequent thereon? It cannot be denied, the written agreement of the 13th of September 1838, contains the whole of the terms entered into between the plaintiffs and Albin; and the plaintiffs must be considered to be in the same situation as if they had taken a legal assignment from Albin, and the plaintiffs cannot now re-model the bargain and make it a new one. The Vice Chancellor in the court below said, the deposit of the lease was co-extensive with the creation of the security, and, though pressed, refused either to order the money to be paid into court, or to direct the plaintiffs to give judgment in the action at law.

Toulmin v. Steere, 3 Mer. 210.

Parry v. Wright, 1 Sim. & Stu. 369;
s. c. 6 Law J. Rep. Chanc. 174.

Mr. Knight Bruce, Mr. Griffith Richards, and Mr. Freeling, in support of the order of His Honour, submitted to pay the money into court, if the Court should be of opinion that it ought to be done, but contended, that where the balance of probability of title was in favour of the plaintiffs, (as in the present case,) it was not usual to order the plaintiffs to pay the money into court; that the effect of the agreement in writing was, that as soon as the lease was executed, it should be given to the plaintiffs; and that if Albin had taken the lease from Gurney, and refused to hand it over to the plaintiffs, the Court would have compelled him to do so; that the lease having been delivered to the plaintiffs, pursuant to the agreement between the plaintiffs and Albin, they thereupon obtained an equitable lien on the premises comprised therein; that matters between the parties remained in the same situation after the conversion of the lease, the proceeds of the subject-matter of the lease having been placed in the plaintiffs' hands instead of the public-house and premises.

Ex parte Pollard in re Courtenay, 4 Dea. 27; s. c. 9 Law J. Rep. (N.S.) Bankr. 26.

Harrison v. Walker, Peake's N.P.C. 111.

Taylor v. Plumer, 3 Mau. & Selw. 562.

Gladstone v. Hadwen, 1 ibid. 517.

Everett v. Backhouse, 10 Ves. 94.

Hunt v. Mortimer, 10 B. & C. 44; s. c. 8 Law J. Rep. K.B. 62.

Ashley v. Kell, 2 Stra. 1207.

Winks v. Hassall, 9 B. & C. 372; s. c. 7 Law J. Rep. K.B. 265.

Dryden v. Frost, 3 Myl. & Cr. 670; s. c. 8 Law J. Rep. (N.S.) Chanc. 235.

THE LORD CHANCELLOR.—In this case, the plaintiffs seek to restrain the defendants from proceeding in an action brought by them for money had and received, on the ground, that the plaintiffs were equitable incumbrancers on the property of the sale, whereof the money in question was the fruits; and with respect to the agreement which was entered into on the sale, I think the true construction of that must be considered as being, that the thing should remain in the same state, the rights of the parties being to be decided, or as nearly as possible in the same state, as if the sale had not taken place. The assignment by which the sale was effected, reciting the title of the plaintiffs as equitable incumbrancers, (the assignees being parties to it,) if taken by itself, would be an acquiescence in their demand. The assignment seemed to assume that shape at the request of the purchaser, who was to take the benefit of the assignment; and as between the parties between whom the question was depending, whether the plaintiffs had an equitable claim on the property or not, it was agreed, that notwithstanding the shape of the expressions used in that assignment, the rights of both parties should remain the same as they were before, and not be at all affected by it. This consequence, however, necessarily followed from the sale, that instead of an action of trover to recover the lease, which would have been the form of an action, in which the assignees would have asserted their title if the property had not been sold, the action brought was an action for money had and received, the money in question being a part of the purchase-money which was

paid over to the plaintiffs on the sale taking place; I, therefore, think, that the parties have agreed amongst themselves, and therefore I am bound to look at this case without reference to the circumstance of the property having changed its form from that of an underlease, to the purchase-money which stands in the place of that underlease; and that that transaction ought not to affect either the rights or remedies which the parties seek to have enforced in this court.

Looking, therefore, at the case as it would have stood independently of the transaction of the sale, the parties having agreed that that should not make any difference in their rights, I have a case of extreme hardship on the part of the plaintiffs; but that would not operate if the case were one in which it was perfectly clear, that notwithstanding the hardship to which they are exposed, they could have no equity against the persons who, at law, probably, would be considered as having the title to the lease. Now, the transaction is one which, as stated by the bill, is met by the answer, as to very many material parts, if not by any statements denying the statements in the bill, but by that which naturally was the case with regard to these assignees—viz. the statement, that they were ignorant of the truth, one way or the other, of the facts stated in the bill; it is perfectly certain, that when the plaintiffs had advanced the 1,000*l.*, they were dealing with persons who were the apparent owners of the property: Gurney was the owner of the lease, and he entered into an arrangement, by which Albin, the person who turned out to be an uncertificated bankrupt, (but not known to the parties to be so at the time,) agreed to take this lease; but he had not the money which was required by Mr. Gurney for the sale of this lease; and previously therefore to the transaction being carried into effect, (whether they came together to the plaintiffs or not, is a matter stated in one way in the bill, ignorance on the other hand being alleged in the answer,) it is quite clear, from the nature of the transaction itself, that in order to enable this person to pay the money to Gurney, the owner of the lease, he procured the money, one 1,000*l.* part of it from Messrs. Meux & Co., and another

1,000*l.* part of it from Messrs. Seager & Co., who are distillers; and what passed at the meeting, the Court at present has no means of knowing. Something may depend on what passed at the meeting when the sale was completed; but the assignees of course knew nothing of what passed; they were not present, and they could know nothing except from what they had been informed by other persons. The form of the lease undoubtedly is to give the uncertificated bankrupt the lease; it is not an assignment, but it is an underlease from Gurney to this person, who, in fact, turned out to be an uncertificated bankrupt, and on that ground, the assignees make their claim; they say, that inasmuch as he was an uncertificated bankrupt, he could not acquire any property for himself, and that he was only capable of acquiring property for the benefit of his assignees. On that ground, assuming that he was at one time the lessee, and, therefore, the proprietor of the lease, and that the plaintiffs claimed through him, and through the title and interest which he had, the assignees say, that he had no right and no power, as against them, to create any interest in the property vested in him; that he became entitled to the property by the under-lease executed by Gurney, and thereby the assignees immediately became entitled to it, and that they were not bound by the subsequent dealings which took place between the uncertificated bankrupt and the plaintiffs, Meux & Co., and the other parties, Messrs. Seager & Co. That is the case of the assignees. The case on the part of the plaintiffs is, of course, at the present moment, not capable of proof, nor is this allegation in the bill to be taken of course as any evidence of the title; but the plaintiffs may depend on the evidence of what took place at the meeting as favourable to them, and may make out the alleged fact, that previously to the contract being carried into effect or completed between Gurney and the bankrupt, there was a contemporaneous contract between the uncertificated bankrupt and Meux & Co., by which it was agreed, that although the uncertificated bankrupt was to take a lease in his name, yet that the lease so taken in his name was, to the extent of the money advanced, to be for the benefit

of Meux & Co. and Messrs. Seager & Co. It may be, that the evidence will displace that case; and it is possible, from the nature of the transaction, and not improbable, that that case may be made out; it is the most probable history of the transaction, as it appears not only from the memorandum itself, but from the facts as they are admitted in the answer, that this party, who was the nominal lessee, had himself not the money; indeed, it is quite clear, he was obliged to find the money from some other parties; and previously to his becoming entitled to the underlease from Gurney, it was arranged that the money should be advanced, and the security given to those by whom the money was advanced. What the effect of that fact is, if it turn out to be, as it is stated on the part of the plaintiffs, will be the question to be decided in the cause. It is not now the time for me to express any opinion as to the result of those facts, if they are established. I am only to look at the pleadings for the purpose of seeing whether there be or not a question to be tried between the plaintiffs and those who, at law, are the owners of the lease—namely, those who stand in the place of the bankrupt, to whom whilst he was uncertificated, the lease was made. I cannot say, that the case is so clear on the part of those who are asserting a title at law; and I am not so certain that the equity asserted by the plaintiffs would not be established against this property, as to justify me in refusing to the plaintiffs the opportunity of going into, and proving and arguing their case, when the proper time shall come. Under those circumstances, I think, that I am exactly in that position in which the Court constantly finds itself, where it is bound to give to the party asserting an equity, the opportunity of proving the case and obtaining the judgment of the Court on the equity so asserted. Of course that will not apply, if the Court saw no ground stated; it is not merely asserting an equity which induces the Court to grant an injunction and to give relief; there must be a probable case, at least a case which is capable of being argued, that the Court may see that there is a question to be discussed, and a question to be adjudicated on. I have no difficulty, therefore, in saying, that the case is such as makes it

the duty of the Court to protect the party who was in the possession of the lease, and therefore could only have been compelled to part with it by an action at law; and which action at law, if it had not taken place, this Court would certainly restrain, for the purpose of giving the plaintiff the opportunity of making out (if he could) the equity which he has asserted. The injunction, therefore, against the action was, I think, very properly granted by the Vice Chancellor.

Now, it has been said, that this action at law will try the equity: certainly it has not been made out to my satisfaction that it will; but if it would, it is not the course of this Court, in a matter certainly originally belonging, and which still belongs, to this Court, to send, or rather to permit a question of equitable lien upon the deposit of deeds under a contract in writing for that purpose, to be adjudicated on at common law, in the form of an action for money had and received. It is a subject-matter for the jurisdiction of this Court; and it is when a proper case arises for that purpose, that this Court will maintain its jurisdiction, and, according to its own rules, decide on the rights between the parties. In all those cases where the property exists in the shape of money, the Court is bound, as it interferes with the claim of the party who is asserting a legal right to it, to take care that the property shall be put in a safe place, and in a safe deposit, in order to obtain the ultimate decision of the Court. It is said, this money is perfectly safe; no doubt it is perfectly safe, but this Court cannot possibly proceed on the degree of credit which particular parties may be entitled to, in the many transactions of this great city. I cannot take notice of such a statement; and this Court knows nothing about it, and I cannot be supposed to exercise any jurisdiction on it; it is at present money out on personal security, and whether those persons who have got it have a credit, which makes that as safe as if it were in the hands of the Accountant General of this court, is not a question which I apprehend this Court can entertain, by exercising any jurisdiction over it. If I were to do that, a great variety of distinctions would have to be considered, as to the degree of security which money in

a particular position in particular hands would be likely to have. Under those circumstances, I do not feel myself at all at liberty to entertain any question, as to whether the money is or is not safe where it is; I have no doubt, personally, that it is perfectly safe where it is, but I cannot exercise the jurisdiction of this court on any such ground; and, therefore, if it is required on the part of the assignees, that the money should be paid into court, I think it is a matter quite of course that the money to which they are *prima facie* entitled, and the legal title to which I prevent them from asserting, by continuing the injunction, should be secured in court, for the purpose of abiding the ultimate decision of the question between the parties. The injunction, therefore, must be continued.

L.C. }
Mar. 17. } WEST v. SMITH.

Practice.—Irregular Order—Taxation of Bill of Costs—Petition—Jurisdiction.

A petition was presented and answered for the taxation of a solicitor's bill of costs, &c., and entitled in a cause which had no existence; a copy of it was then served on the solicitors, who, by letter to the petitioner's solicitors, apprised them of the irregularity of the petition, and of their intention not to appear upon it. An order was then obtained by the petitioner on the petition day, to adjourn the hearing of the petition till the next petition day, with liberty in the meanwhile to amend the petition. The petition was accordingly amended, one of such amendments being the entitling it "In the matter" of the solicitors (stating their several names), in addition to the title of the cause. No new fiat was affixed to the petition, and it was served on the solicitors, who declined appearing upon it. An order was obtained by the petitioners for taxation of the solicitors' bill of costs, on the condition (suggested by the petitioner's counsel) of paying the amount of the bill of costs into court. This order was discharged by the Master of the Rolls, on the motion of the solicitors, before the amount of the bill of costs was paid into court. On appeal, the Lord Chancellor affirmed the order of the Master of the Rolls,

discharging the previous order obtained for the taxation of the bill of costs; the Court below having no jurisdiction, under the circumstances stated, to make such a previous order.

Messrs. Stevens & Co., solicitors, having been employed by Hannah Maugham and Frederick Thomas West, the executors under Edward Ellecott's will, relative to the testator's affairs, on the 19th of September 1840, duly signed and delivered their bill of fees to Hannah Maugham, amounting to 82*l.* 5*s.* 4*d.*, which included (amongst other things) certain items charged relative to a bill in equity, which had been drawn and settled by counsel, (but not filed,) and in which Hannah Maugham and F. T. West were plaintiffs, and William Smith, formerly the testator's partner in business, was defendant. On the 19th of October 1840, Hannah Maugham alone (her co-executor refusing to join therein) presented her petition to the Master of the Rolls, headed in the alleged cause of "*West v. Smith*," praying the usual taxation of the bill of costs of Messrs. Stevens & Co. The petition was answered by his Lordship, for the 3rd of November 1840, and copies thereof were duly served on the solicitors and F. T. West, and on the 22nd of October 1840, Messrs. Stevens & Co., by letter, apprised Messrs. Maugham & Co., the solicitors of Hannah Maugham, that the petition was irregular, and that they should not appear thereon. On the 3rd of November, an order of court was obtained on behalf of Hannah Maugham, for an adjournment of the petition until the next day of petitions, with liberty in the meanwhile for the petitioner to amend her petition as she should be advised. The petition was amended, by entitling it "In the matter" of William Stevens, &c., solicitors of this honourable court, as well as in the cause of "*West v. Smith*," and on the following day, the 4th of November, a copy of the order of the 3rd of November, and also of the petition as amended, were served on Messrs. Stevens & Co., by the solicitors of Hannah Maugham. On the 5th of November, Hannah Maugham was served by Messrs. Stevens & Co. with the copy of a writ of summons, dated the 21st of October 1840, in an action at law, commenced by them for recovery of the

amount of their bill of costs against the executors. The amended petition was heard on the 24th of November, when, Messrs. Stevens & Co. not appearing, an order was made by the Court for the taxation of their bill of costs, &c., and restraining any further proceedings in the action; and it was made part of the order, that the petitioner should pay into court, to be placed to the credit of the *cause and matter*, the amount of the bill of costs, &c. The order of the 24th of November was served on Messrs. Stevens & Co., on the 9th of December; and on the 12th of December, and before the amount of the bill of costs was paid into court, Messrs. Stevens & Co. served a notice of motion on the petitioner to discharge that order. The Master of the Rolls on the 22nd of December discharged his order of the 24th of November; and it was now sought, on behalf of the petitioner, that the order of the 22nd of December might be discharged by the Lord Chancellor.

Mr. Griffith Richards and *Mr. Tennant*, in support of the motion, contended, that the heading of the petition in the cause, was mere surplusage, and had nothing in it calculated to mislead; that where a petition was headed in Chancery as well as in Bankruptcy, the entitling it in Chancery was held not to be of such effect as to render the order made on the petition invalid — *Ex parte Hudson* (1); that as the Court had jurisdiction to make the order "in the matter," the naming a cause at the head of the petition, was of no importance; that according to the case of *In re Dovenby Hospital* (2), an application ought to have been made to the Court to take the petition off the file for irregularity; and that the practice in the case of an application for an infant trustee to convey, was to entitle the petition in the several trustee acts, and not in one only of them, and that such a course had never been considered to be objectionable.

The other cases cited on behalf of the appellant were—

Lees v. Nuttall, 2 Myl. & K. 284; s. c. 4 Law J. Rep. (N.S.) Chanc. 124.

(1) 2 Glyn & Jam. 228.

(2) 1 Myl. & Cr. 279; s. c. 5 Law J. Rep. (N.S.) Chanc. 212.

Bishop v. Willis, 2 Ves. sen. 113.
Fitch v. Chapman, 2 Sim. & Stu. 31;
 s. c. 2 Law J. Rep. Chanc. 172.
Eastwood v. Glenton, 2 Myl. & K. 280;
 s. c. 3 Law J. Rep. (N.S.) Chanc. 147.

Mr. Wakefield, contrà.—The petitioner's solicitors must have well known, from the contents of the bill of costs, delivered to them, that at the time of the petition being first presented, no such cause as that of "*West v. Smith*" was in existence. Besides, they were informed by Messrs. Stevens & Co. that they should not appear on the petition. No bill in equity, therefore, having been filed, the bill of fees, &c. was not taxable in this court, and yet being apprised of that fact, the petitioner's agents wilfully entitled the petition in a non-existing cause. The name of the cause is a very essential ingredient in the case. The petition was then amended, and headed "In the matter," as well as in the cause; in reality, at the time of the amendment being made, there was no petition in existence, the order to amend having been made in a cause which did not exist. There was nothing (to use a technical expression) to amend by, at the time the amendment was made. In order to give the Court jurisdiction in the present case, a new petition ought to have been presented. The Master of the Rolls, on the application to him to discharge the order of the 24th of November, stated, that the petitioner had made use of an untrue title. In *Bishop v. Willis*, counsel attended on both sides, and as to the case of *Lees v. Nuttall*, the objection did not prevail; and in *Eastwood v. Glenton*, no judgment was exercised by the Court; and the present case is clearly distinguishable from all the other cases.

The LORD CHANCELLOR.—It is quite clear the order of the 24th of November was of no value, the Master of the Rolls having no jurisdiction to entertain the petition, there being no such cause in existence as the alleged cause of *West v. Smith*, when the petition was presented in October 1840. The petition was at that time entitled only in the cause; and on its being served on Messrs. Stevens & Co., they gave written notice to the petitioner's solicitors, of the irregularity of the proceeding.

The petitioner was aware of this defect, and applied to the Court for liberty to amend the petition, the Court not having an opportunity of considering whether the intended amendments were proper or not. The petition was then amended, by heading it "In the matter," in which the Master of the Rolls possessed jurisdiction, but no fiat of his Lordship was affixed to the amended petition. The other parties, naturally enough, abstained from appearing before the Court, having been advised that the Court had not jurisdiction to entertain the petition. The affidavit of service is correct, as far as it goes, and states the service of the original and amended petition, but does not state the error that existed, nor the purport of the amendment made: on that, the order is drawn up by the petitioner; but what jurisdiction had the Master of the Rolls to make the order in question? There was no such cause in existence as that found at the head of the petition, and the Master of the Rolls had no jurisdiction in the matter, without the petition having been properly served, and his fiat previously obtained thereto in the usual way. The cases adduced on the part of the petitioner have no application to the present case. The present order of the 24th of November, was obtained from the Master of the Rolls, under circumstances which, if known to the Master of the Rolls at the time he made the order, would at once have prevented the order being made.

M.R. }
 Jan. 19. } OLDFIELD v. COBBETT.

Practice.—Executor—Pauper—Costs.

Executors not allowed to defend suits in formâ pauperis.

A pauper defendant liable to pay costs of impertinent and scandalous affidavits.

This suit was instituted for the administration of the estate of the late Mr. Cobbett. The defendant was his son and executor, and he had obtained an order, that he might be allowed to defend this suit *in formâ pauperis*. On the 30th of March 1840, the plaintiff obtained an order from the Master of the Rolls, dispauperiz-

ing the defendant, and ordering him to pay the costs of an affidavit made by him on a petition in the cause, which petition had been found impertinent and scandalous. These costs amounted to about 40*l*. The defendant claimed to be a creditor of the testator, and was also his residuary legatee, but the estate was insolvent; and the defendant had also lately taken the benefit of the Insolvent Debtors Act. The defendant had presented a petition, praying that the last-mentioned order of the Master of the Rolls might be discharged.

Mr. Cooper, in support of the petition, contended, that as the defendant had an interest in the estate of his testator, he was in a different position from a person who was merely an executor: that *Paradice v. Sheppard* (1) only decided that an executor could not sue as plaintiff, *in forma pauperis*.

Statute 11 Hen. 7. c. 12.

James v. Dore, 1 Dick. 788.

As to the costs of the impertinent affidavit, there was a dictum in *Tothill's Reports* (2), that a pauper ought to pay such costs, but there was no recent authority for such a rule—*Rattray v. George* (3).

The MASTER OF THE ROLLS (without hearing *Mr. Pemberton*, who appeared for the plaintiff,) said, that Lord Cottenham, when he was Master of the Rolls, had considered the question, whether executors were to sue or defend suits *in forma pauperis*; and he laid down the rule, that they ought not to do so: that as the defendant in this suit was an insolvent, any interest he might have in his father's estate, either as creditor or legatee, was now vested in his assignees; and, therefore, the general rule as to executors would apply to him: that if he was allowed to defend the suit *in forma pauperis*, he would still be liable to the costs of a scandalous affidavit; and that his Lordship thought the order of the 30th of March was correct; and he must, therefore, under these circumstances, dismiss this petition, with costs.

(1) 1 Dick. 136.

(2) Page 237.

(3) 16 Ves. 232, and the cases there cited.

M.R. }
Jan. 21. } HADDELSEY v. NEVILE.

Practice. — Amendment of Bill — 13th Order of 1831.

The bill had been amended, and the defendants to the amended bill had not yet answered:—Held, that the six weeks within which the bill might be amended, by virtue of the 13th order of 1831, must be counted from the time at which the last answer which was put in to the original bill, was to be deemed sufficient.

In this suit, the original bill was filed on the 24th of December 1839, against two defendants. The answers were put in respectively on the 10th and 13th of March 1840; and, consequently, the time within which the plaintiff was at liberty to amend, expired on the 19th of June.

On the 10th of June, the plaintiff obtained an order to amend, and amended accordingly, by adding parties and otherwise. The answers put in to the amended bill, by the two defendants to the original bill, were filed on the 31st of October 1840, and would be sufficient on the 14th of January 1841; but some of the parties who were made defendants to the amended bill, had not yet put in their answers.

The plaintiff now moved for leave to amend, without requiring further answer, for the purpose of introducing into the bill some letters which he had not discovered till the 2nd of December 1840.

Mr. Pemberton and *Mr. Wright*, in support of the motion, cited—

Lloyd v. Wait, 4 Myl. & Cr. 257.

Attorney General v. Nethercoat, 2 Myl. & Cr. 604; s. c. 7 Law J. Rep. (n.s.) Chanc. 75.

Mr. James Russell, contra, contended, that the affidavits which had been made were not sufficient; and also insisted, that this application ought to have been made before the Master, and not to the Court, inasmuch as it was made within six weeks from the time at which the answers which were put in, in October, were to be deemed sufficient.

Few v. Guppy, 1 Myl. & Cr. 487.

Attorney General v. Lubbock, *ibid.* 264, were referred to.

The MASTER OF THE ROLLS said, he thought the time referred to in the 13th order, must be the time when the last answer to the *original* bill was filed; and that, therefore, the plaintiffs were right in this case in coming to the Court. His Lordship, therefore, gave the plaintiffs leave to amend, by introducing the two letters, upon correcting the defects in the affidavits.

Note.—See also *Wharton v. Swann*, 2 Myl. & K. 364, *Cullingworth v. Grundy*, *ibid.* 359, *Smith v. Webster*, 3 Myl. & Cr. 245, *Smith v. Evans*, 1 Russ. & Myl. 80, *Cottingham v. Potts*, 1 Russ. & Myl. 81; s. o. 8 Law J. Rep. Chanc. 8.

L. C. }
Jan. 21. } GAGE v. WHATMOUGH.

Practice.—*Order of the Court—Accountant General—Bankruptcy.*

In this case, the Court, by decree, had ordered payment to the plaintiffs, who were three in number, and were trustees, (but not so described in the order,) of a sum of 1,609*l.*, standing in the name of the Accountant General, in trust in the cause. The three plaintiffs executed a power of attorney to their solicitor to receive the amount; but before the same was received by the solicitor, one of the plaintiffs became bankrupt: on application to the Accountant General, by the solicitor holding the power of attorney, for payment of the money, he refused to pay the same, on account of the bankruptcy of one of the trustees, although he had no other notice of the bankruptcy than the prevailing notoriety of the fact.

Mr. Torriano asked his Lordship to vary the order, and direct the Accountant General to pay the money to the solicitor holding the power of attorney, on behalf of the two remaining solvent parties.

The LORD CHANCELLOR observed, that there ought to be a new application, and a supplemental order made for payment to the two solvent plaintiffs, exclusively of the bankrupt; but as it appeared that all the *cestuis que trust* were competent to consent, and appeared on the application and consented thereto, his Lordship ordered the money to be paid to the solicitor and the two solvent trustees.

M.R. }
Feb. 8. } ATTORNEY GENERAL v. WRIGHT.

Practice.—*Information.*

A relator to an information cannot, on his own behalf, make any application to the Court.

The information in this case was filed by the Attorney General, at the instance of a relator, and a notice of motion stated to be given on behalf of the relator, was served on the defendant.

Mr. Chandless objected to the notice of motion as irregular, and insisted, that it ought to have been given on behalf of the Attorney General.

Mr. Willock, in support of the motion.

The MASTER OF THE ROLLS held, that the notice was irregular, and that the relator to an information was not recognized as a party thereto, and could not of his own authority make any application to the Court.

Note.—Vide *The Attorney General v. Dove*, Turn. & Russ. 328, and *The Attorney General v. Plumtree*, 5 Madd. 452. A decision to the same effect was made by Sir J. Leach, V.C., and acted on by the present Lord Chancellor, in *The Attorney General v. the Ironmongers' Company*, (*Betton's Charity*), *ante*, 201.

M.R. }
Mar. 5, 6. } SALT v. CHATAWAY.

Will—Legacy—Construction.

*A testator, after directing the proceeds of his real estate and his personalty to form one common fund, bequeathed 100*l.*, and also a sixth part of a share in the residue, to J. B., who died in the testator's lifetime:—Held, that the lapsed legacy of 100*l.* fell into the residue; but that the share of residue bequeathed to J. B. belonged to the testator's heir-at-law and next-of-kin, in proportion to the amount in which his real and personal estate had respectively contributed to the residue.*

Thomas Salt, by his will, dated the 10th of November 1831, gave and devised all his real and personal estate, subject to the payment of his debts and funeral and tes-

tamentary expenses, to three trustees, upon trust to sell, and out of the proceeds of the estates and out of the ready money he might die possessed of, to pay certain legacies, and, among such legacies, to pay to his grandson John Blaydon, 100*l.*, when he should attain the age of twenty-one years. And the testator directed, that all the residue of his monies should be divided into three equal parts, and out of one of such parts he directed his trustees to pay 100*l.* to W. B., and to invest the remainder of such one-third part as therein mentioned, and continue such investment "until his six grandchildren, John, Mary, Caroline, Elizabeth, Walter, and William, the children of his late daughter Alice Blaydon, should respectively attain the age of twenty-one years, and when and as each of them should attain his or her age of twenty-one years, should pay him or her an equal part thereof."

The testator died in April 1833. His grandson John Blaydon had died in the lifetime of the testator, an infant and unmarried.

This suit was instituted to have the trusts of the will carried into execution. It was stated, but not proved, that the personal estate of the testator was exhausted by the payment of his debts; and, consequently, that the legacies were to be paid entirely out of the proceeds of the real estate. With regard to the legacy of 100*l.*, bequeathed to John Blaydon, a question was raised, whether this legacy would lapse for the benefit of the testator's heir-at-law or next-of-kin, or whether it would fall into the general residue. And with regard to the share of the residue, which was bequeathed to John Blaydon, a question was raised, whether it would belong to the testator's heir-at-law or next-of-kin, or would be divisible among John Blaydon's brothers and sisters.

Mr. Spence and *Mr. Parker* appeared for the plaintiffs; and—

Mr. Treslove, Mr. Tennant, Mr. Lewis, Mr. Tillotson, Mr. Thomas Parker, and Mr. Whitmarsh, for different defendants.

The following cases were cited:—

Roberts v. Walker, 1 Russ. & Myl. 752.
Kennell v. Abbott, 4 Ves. 802.

Green v. Jackson, 5 Russ. 35; s. c. 2 Russ. & Myl. 238.

Durour v. Motteux, 1 Ves. 322.

Ackroyd v. Smithson, 1 Bro. C.C. 503.

The MASTER OF THE ROLLS said, that the testator had expressed an intention to convert his real estate into personalty, for the purposes of his will, but not for any further object; and that as part of his intention—namely, the benefit proposed for John Blaydon—had failed by his death in the lifetime of the testator, the title to the share of residue given to John Blaydon would be decided by the rules of law, and it would belong to the testator's heir-at-law and next-of-kin, in the proportions in which his real estate and his personalty had contributed to the residue: but that with regard to the pecuniary legacy which had been given to John Blaydon, his Lordship would follow the cases of *Durour v. Motteux* and *Green v. Jackson*, and should hold, that the legacy of 100*l.* fell into the residue, and passed by the residuary bequest.

M.R. }
Mar. 9. } DOWDING v. SMITH.

Will—Legacy—Construction.

A testator directed that the residue of his property should devolve to M. S., and to the children of J. S., to be equally divided:—Held, that M. S. and the children of J. S. took in equal shares per capita.

A testator, after having made his will, without date, added to it a memorandum in these words:—

"Memorandum.—No legacies to be paid till after the decease of my dear wife, and then the residue of the property to devolve to my niece Miss Mary Stockdale, of Piccadilly, and to the children of Mr. John Stockdale, to be equally divided."

The testator's widow died in December 1839. There were six children of John Stockdale, five of whom were living at the death of the testator, and had now all attained twenty-one; and the sixth child had been born since the testator's death.

This was a petition presented by the executor, praying, among other things,

that the residue might be apportioned by the Master among the residuary legatees.

A question was raised, whether the residue was to be divided into two equal parts, and one half given to Mary Stockdale, and the other half to be divided among the children of John Stockdale; or whether Mary Stockdale was merely to have an equal share with each of John Stockdale's children.

Mr. Pemberton, Mr. Koe, and Mr. Roupell, appeared for different parties.

Blackler v. Webb, 2 P. Wms. 383.

Buller v. Stratton, 3 Bro. C.C. 368.

Barnes v. Patch, 8 Ves. 604.

Bolger v. Mackell, 5 Ves. 509, were cited.

THE MASTER OF THE ROLLS.—Both parties contend, that these words "equally to be divided," apply to both of them; and the question is, the effect which it will have. If it is to apply to the whole fund, what good reason is there, why it should stop at the first division into two equal parts, and not apply further? I find it very difficult to do what, if the testator had been asked, he might probably have done. He would, perhaps, have given a different answer respecting his intention, from that which must be inferred from his expressions in this will.

I think the division must be made *per capita*.

M.R. }
Mar. 11, 12. } JACKSON v. COCKER.

Railway Company—Sale of Scrip Certificates of Shares.

A sale was made of scrip certificates of shares in a projected railway before the passing of the act by which the company was incorporated; and after the act was passed, the vendor filed a bill against the purchaser to compel him to accept a transfer of the shares, and to indemnify the vendor against all calls in respect of them:—Held, that the purchaser of the scrip certificates had not rendered himself liable to these calls; and the bill was dismissed, with costs.

In 1837, an act of parliament was passed (1 Vict. c. 121), intituled, 'An Act for making a railway from Bolton-le-Moors

to Preston, in the county palatine of Lancaster.' This act contained the usual clauses for the incorporation of the company, and the creation of capital by shares, and for the transfer of those shares, and other clauses which are generally inserted in railway acts.

Before the bill was introduced into the House of Commons, an agreement, in the ordinary form, was entered into by the promoters of the undertaking, by which they agreed with one another to contribute proportionally toward the expenses of the proceedings, and to take a certain number of shares; and the parliamentary contract, which is required by the standing orders of the House of Commons, was also entered into. The parties who signed this instrument received a scrip certificate for each of the shares which they agreed to take; and these scrip certificates were in the same form as the following certificate, which was one of the exhibits in this suit:—

"Bolton and Preston Railway certificate.

"50*l.* share, No. 1,323.

"The holder of this certificate having signed the subscribers' agreement, and executed the parliamentary contract, is the proprietor of the above share in this undertaking.

"B. H. } Members of the Committee.
"B. D. }

"Bolton, 19th July 1836."

In August 1836, the defendant applied to Mr. Mawdsley, a broker, at Little Bolton, in Lancashire, and stated, that he was desirous of purchasing some shares in the Bolton and Preston Railway Company. Mawdsley introduced him to the plaintiff, who agreed to sell him forty shares. The defendant paid to the plaintiff 120*l.* for these shares, and the certificates were then delivered by the plaintiff to the defendant, who still had them in his possession. This constituted the whole of the transactions between the parties, and no special agreement was entered into between them, either that a transfer should be made of the shares, or that the defendant should exonerate the plaintiff from any liabilities respecting them, or of any other description.

It appeared that none of these shares were standing in the name of the plaintiff in any books of the company, but that

he had purchased the certificates from other parties.

In 1837, the act was passed; and several calls were made under the authority of the provisions of the act. The plaintiff was called upon by the parties from whom he purchased the shares, to pay some of these calls amounting to 280*l.*; but whether he had entered into any express agreement with these parties to indemnify them from future calls, or under what circumstances he was considered liable to pay such calls, did not appear.

The plaintiff applied to the defendant, and requested him to accept a transfer of the forty shares in the company, and to pay all the calls in respect of them, which the defendant declined to do. The plaintiff thereupon filed this bill, by which he prayed that the agreement for the purchase by the defendant of the forty shares or certificates, from the plaintiff, might be specifically performed; and that the defendant might be decreed to indemnify the plaintiff against the said calls which had been made, and any other calls which should thereafter be made in respect of these shares, and all actions in respect thereof.

Mr. Tinney and Mr. Walker, for the plaintiff.—The sale of shares in a railway company, before the company has been incorporated by act of parliament, is carried on probably in every case in which a railway is contemplated; and the thing which is agreed to be purchased is not a general interest in the undertaking, but a definite and particular share, or number of shares—*Doloret v. Rothschild* (1). The purchaser has possession of the certificates; and if any profit arises from them, he is the party who has the benefit of it. The Court will therefore impose upon him an obligation to indemnify the vendor against any payments which may be required in respect of those shares, which he has given up to the purchaser.

Burnett v. Lynch, 5 B. & C. 589; s. c. 4 Law J. Rep. K.B. 274.

Waring v. Ward, 7 Ves. 337.

Mr. Kindersley and Mr. J. Russell, for the defendant.—The defendant contracted to purchase certificates of shares, and the plaintiff now seeks to compel him to take,

together with those certificates, certain obligations which the defendant never intended to assume, and which it is not the custom that a purchaser of such things should be liable to. Until a company is incorporated, the interests of the parties in the undertaking cannot be transferred, so as to relieve the vendor from his liability, without some express stipulation between the parties. The vendor must be left to such remedy as he has against the purchaser at law. A contract may be sued upon at law, although it relates to a mere equitable property—*Josephs v. Pebrer* (2).

March 12.—**THE MASTER OF THE ROLLS.**—This has been very justly said to be a bill of the first impression, for I certainly recollect no bill in the least degree like this. The case is brought forward in great confusion, and in a very imperfect manner. The defendant has properly enough waived a part of the confusion—waived the benefit of any confusion—and has agreed to have this considered as a case founded on the facts which are now admitted, and therefore the case is relieved from a difficulty which might have arisen in that respect.

This bill is filed for the specific performance of an alleged agreement for the purchase of certain shares in a railway company. It seems, that in the month of July 1836, certain persons proposed to apply to parliament for an act to authorize the construction of a railway from Bolton to Preston. For that purpose they entered into subscriptions; and we may assume that they contemplated raising a capital to defray the expenses of applying for, promoting the progress of, and completing the act of parliament, if they could get it; and for executing the necessary works, if the act should be obtained. Two things were important for them to do. One was to come to such an agreement amongst themselves as should provide for a due contribution towards the expenses in all events, whether the project should succeed or not. Another was, that they should comply with the regulations which have been adopted by parliament in cases of applications for bills of this nature. Now, the standing orders of the House of Commons, which have been produced, require

(1) 1 Sim. & Stu. 594; s. c. 2 Law J. Rep. Chanc. 125.

(2) 3 B. & C. 639; s. c. 3 Law J. Rep. K.B. 102.

that a contract, which is called a subscription contract, shall be signed in a particular manner; and then we know, that the common effect of acts of parliament of this sort, when passed, is to incorporate the persons who have subscribed, or shall subscribe, towards the undertaking, and the several and respective successors, executors, administrators, and assigns of such person; to enable them to raise money amongst themselves to a limited amount; and to divide that amount into shares, which are to be transferable. Subscription contracts must be made to a certain amount, and in a certain manner, before the bill can be introduced. But the transferable shares of the capital, the proprietorship (if it can be so called), are the result of the act, and of the powers and privileges which are given by the act. Now in this, as in other cases of the like kind, the persons who subscribe for the purpose of obtaining the act and the fruits of the act, very naturally proportion their subscriptions to the amount of the shares which they desire either to possess or to have the means of dealing with; and their hopes or expectations of obtaining shares, or the right to deal with shares, have been commonly, but very erroneously, called *shares*. And whereas the act, when passed, constitutes shares, and makes them transferable, the subscribers have divided their subscriptions into shares, and have taken upon themselves to grant certificates as evidence of the right to shares, or of the right to obtain shares; and these certificates have been often considered as evidences of the shares; and to distinguish them from the real title to shares, they have been called, as they have properly been called in this case, "scrip certificates." Not only have such certificates been granted, but they have been bought and sold; and as all of us must too well know, they have been made the means of gambling, of bribery, and of frauds of the most extensive character. Whether or no they are legal in any event, is a question which might, perhaps, have deserved greater consideration than it has received to-day. I am not disposed to treat lightly the suggestions which were made by Lord Tenterden (3). Certainly nothing has to-

(3) 3 B. & C. 644; and 3 Law J. Rep. K.B. 103.

day occurred which makes me think that that question is not of the most serious consideration. It does not, however, appear to me to be necessary to decide it on the present occasion; and considering here, that there is no imputation of fraud or of malpractice of any kind, we are here to look, as I apprehend, at the nature of the transaction, and see whether we can discover from the facts which belong to it, the foundation of any such right as is claimed.

That which is called the subscribers' contract seems to have been entered into in the month of July. I do not think it appears distinctly in evidence, what was the date, but it is stated to have been the 13th of July. At any rate, it is admitted to be, I think, before the date of one of the certificates, which was produced to me. Certain persons having subscribed—having made themselves liable to one another for the expenses which were to be incurred—having done such acts as might ultimately be necessary towards inducing parliament to receive the bill—having, as I assume, done those things (which I must assume, I think, for the benefit of both parties)—what was done on this occasion was very like what has been done on very many other occasions, calling their subscriptions "shares;" they delivered a certain certificate to each subscriber, according, as I presume, to the number of his shares. The certificate which has been produced to me, one of the forty, the subject of this suit, is thus expressed: "The holder of this certificate, having signed the subscribers' agreement, and executed the parliamentary contract, is the proprietor of the above share in this undertaking." He is "the proprietor of the above share in this undertaking"—a share which could not be constituted—a share which could not exist until after the act of parliament had passed incorporating this company, and giving them the means of having a joint stock divisible into shares which were transferable. He is "the proprietor of the above share." When is he proprietor? "The holder of this certificate, having signed the subscribers' agreement and executed the parliamentary contract, is the proprietor." Now, the first holder of this agreement, I am assuming—for it is not proved, but

I am assuming—the first holder of this certificate is a person who had signed the subscribers' agreement, and executed the parliamentary contract; meaning, by the parliamentary contract, as I am also assuming,—for everything is left here in a dubious state,—meaning that contract which, in the standing orders of the House of Commons, is called the subscribers' contract, without the signature of which, in a particular form and to a particular amount, the bill would not be entertained beyond a certain stage. Well then, he having obtained this certificate is not the proprietor, but is a person who, if the act of parliament passes, will be entitled to become the proprietor of a share. He having this, passes it into the hands of another person—he does it for a valuable consideration. That other person signs no special agreement—does not do anything whereby he binds himself in any way to indemnify the party from whom he received it from his liabilities in respect of his signature of the contract, or his execution of the parliamentary contract; nor sign any agreement by which he engages himself to become a proprietor; but he pays a certain sum of money (in this case I think it is said to be 3*l.* a share), and having paid that sum of money, he receives this *certificate*, as it is called. Now, here we have a certificate in the hands of a person who has done nothing whatever but pay a sum of money to another. He has not signed the subscribers' agreement; he has not executed the parliamentary contract; he is not, either at the present time or prospectively, “the proprietor of the above share in this undertaking,” because he is not a person who has done those things.

But then the whole argument, as I collect it, in this case is really this: having possessed himself of his certificate, he must be understood by law to have taken with it an obligation to do all those things by which he shall constitute himself a proprietor, and (having constituted himself a proprietor) by which he shall indemnify the party from whom he received it. Or if he does not become a proprietor before the other has been subject to liabilities, then, besides becoming a proprietor, which would exonerate the other party from further liabilities, he ought also to do some act by which he may exonerate that party

from past liabilities, which may have been incurred.

Now, then, we come really to the question, whether a transaction of this nature is such that the Court will raise such a special contract as this which is contended for; and certainly I have listened in vain for any satisfactory reason to convince me that there is such an implied contract in such a case. What he does is this: he gets a certificate, by which he is told that if he does certain things he will be a proprietor, and have certain rights. That is the only rational construction which I can give to it. It is expressed with great ambiguity—I should rather suspect with studied ambiguity; but it is expressed with great ambiguity; telling him, in effect, I suppose, this, that if he does certain things, then he will become a proprietor: that is, if he signs the parliamentary contract, if he executes the subscribers' agreement, if the act of parliament shall pass, then under those circumstances he will become a proprietor; and all those things must concur before he can become a proprietor.

Now, one argument which was used is certainly rather extraordinary, because it is said here, that the brokers, the persons who deal in these certificates or securities, found that they could not procure so good a sale if they clearly expressed that which was intended on the part of the vendor. The vendor, meaning that the law should raise such an agreement as is contended for, does not think fit to express it; because, if he did express it, the purchaser would be on his guard, and would not enter into such an agreement. Therefore the brokers, who in this case are acting as the agents of the vendor, are to express the thing ambiguously, and afterwards the vendor himself is to take advantage of the ambiguity, and to fix on the purchaser an obligation which the contract itself (if it can be called a contract) did not import, and which the party himself did not intend. It is said, these were not sold by the broker. They were sold, I believe, by the agency of Mr. Mawdsley; and the parties to the purchase and sale call this a purchase of *shares*, which it certainly was not, and could not be by either party be so understood; it was a purchase of these certificates.

Now the question is, whether there is a contract for indemnity; whether there is a contract, in all events, to become the proprietor of shares. I cannot find it expressed; I cannot find it raised by implication of law. There is no evidence of it in my opinion; there is not such an agreement as the plaintiff seeks to have specifically performed; and therefore I must dismiss this bill, with costs.

M.R. }
March 25. } BROWN v. SAWER.

Practice.—Striking out Name of a Co-plaintiff and making him a Defendant.

Two persons gave a joint authority in writing to their solicitor to institute a suit, and after some proceedings one of them refused to continue the suit as co-plaintiff. The other co-plaintiff obtained an order upon motion, authorizing her to make the other party a defendant, and that party was ordered to pay the costs of the application, and the costs which should be incurred by the co-plaintiff, in giving security for costs.

A motion was made on behalf of Martha Gresham, one of the two plaintiffs in this suit, that she might be at liberty to amend the bill, by striking out the name of William Frederick Brown as a co-plaintiff, and making him a defendant, and that W. F. Brown might be ordered to pay to Martha Gresham the costs occasioned by such amendment, and also the costs of giving any security for costs which the defendants, or any or either of them, might be declared by the Court entitled to, in consequence of such amendment, and incidental thereto, and also the costs of and incident to this application, to be taxed as between solicitor and client.

The two plaintiffs had given to their solicitor a written retainer to institute and proceed with this suit, which retainer was dated the 29th of November 1839. It was stated in the answer of one of the defendants, that Brown wished the suit to be compromised, and had expressed his disapprobation of the institution of it. On the 7th of December 1840, the solicitor received a written note from Brown, requiring him to withdraw his name as plaintiff in the suit, and forbidding him from

taking any further steps therein on his behalf as plaintiff.

Mr. Anderdon appeared in support of this motion.

Mr. Willcock, for the plaintiff Brown; and—

Mr. Terrell, for some of the defendants, contended, that although a plaintiff might be made a defendant, where he was wanted as a witness, still one plaintiff could not obtain, as against a co-plaintiff, such an order as was now asked for, merely because the plaintiffs could not agree that the suit should be prosecuted, and where the interests of the defendants would be materially affected.

Holkirk v. Holkirk, 4 Mad. 50.

Lloyd v. Makeam, 6 Ves. 145.

Motteux v. Mackreth, 1 Ves. jun. 142.

Attorney General v. Cooper, 3 Myl. & Cr. 261; s. c. 8 Law J. Rep. (n.s.) Chanc. 19.

Small v. Attwood, You. 412; s. c. 2 Law J. Rep. (n.s.) Ex. Eq. 9.

Mr. Hall appeared for other defendants.

THE MASTER OF THE ROLLS.—I must make the order. It is a case in which the plaintiffs gave joint authority to institute the suit, and claimed similar rights. The bill was filed; and the answer states, that one of the plaintiffs impeaches the propriety of the suit. I believe it to be the same in principle as *Small v. Attwood*; but this case goes further, for the plaintiff, who had in this case given written instructions to his solicitor, afterwards revokes the authority, which makes it impossible for the other plaintiff to go on with the suit. She cannot go on, in consequence of the proceeding of this plaintiff. I think, therefore, that this order must be made, but on such grounds as will be just to the defendants.

His Lordship, therefore, ordered that Martha Gresham should be at liberty to make Brown a defendant, and that she should pay to the defendants their costs of this application as between party and party; and that Brown should repay those costs to M. Gresham, and pay to her, her costs of this application, and the costs of her giving security for costs to the defendants.

V.C.
March 12.

THE ATTORNEY GENERAL, INFORMANT, AND MASTER, WARDENS AND COMMONALTY OF THE MYSTERY OF CORDWAINERS, LONDON, v. SOUTHGATE.

Conversion — Real Estate — Personality affected with Land, and pure Personality — Payment of Debts, Legacies, and Costs, pro ratâ.

A testator seised of real estate, and possessed of leasehold and other personal estate, devised and bequeathed the whole to trustees, to make sale of and get in all his real and personal estate, and out of the produce to pay his funeral and testamentary expenses, debts, and certain legacies; and he bequeathed the residue for charitable purposes. In a suit to administer the estate, ordered, that the costs should be paid out of the real estate, and the personal estate savouring of realty, and the pure personal estate, pro ratâ; and that the funeral expenses, debts, and legacies, should be paid out of the personal estate savouring of realty, and the pure personal estate, pro ratâ.

James Milner, by his will, dated the 19th of March 1830, gave, devised, and bequeathed unto J. Banks, and the defendants J. Southgate and W. Rowe, all his freehold and leasehold property whatsoever and wheresoever, whether the same might consist wholly or in part of estate freehold, copyhold, or for terms of years; also all his personal property, consisting of money in the funds, in or out upon security at interest or otherwise, book debts, stock, and utensils in trade, or whatever other sort or kind the same or any part thereof might be, to hold the same to them, the said J. Banks, J. Southgate, and W. Rowe, their executors, administrators, and assigns, upon trust to make sale and dispose of all his said property, and call in and receive all such debts, and execute all such deeds and conveyances or assurances in the law, and give such receipts as might in all and every case be necessary for the perfecting such sale or sales, and on receipt of all the monies to arise and be produced by the sale of his whole property, deposit the same in their joint names in the Bank of England, to form a fund out of which to pay in the first place his just debts and

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expenses attendant on that his will, and then to invest, distribute, and pay over the residue thereof as thereafter described and directed; and after disposing of part of his property, with reference to a settlement which he had made on his niece, and bequeathing certain legacies, from and after every demand on his (the said testator's) estate should be satisfied, he gave, devised, and bequeathed the residue of his property then remaining in the hands of his said trustees in the Bank of England as aforesaid, (and also certain legacies, in the events therein mentioned,) unto the master, wardens, and court of assistants of the Cordwainers' Company, in Distaff Lane, London, for the time being, to hold to them, the said master, wardens, and court of assistants, and their successors for ever, upon trust to invest the same in government securities, and to pay certain annuities out of the dividends thereof to distressed fathers of families, to be selected in manner therein mentioned.

The testator was at the time of making his will, and of his death, seised of freehold estate, in the city of London, and he also died possessed of considerable leasehold and other personal estate, all of which were sold by his executors, according to the directions of the will. The decree, on the hearing, directed the Master to take an account of the monies produced by the sale of the freehold estate, and also of the leasehold estate, and an account of the personal estate, distinguishing that part which was secured on land; and also to inquire who was the heir-at-law of the testator, and who were his next-of-kin. The Master's report found the amount of the several portions of the testator's estate which had been produced by the sale of his real estate,—from his personal estate affected by land,—and from the pure personal estate. He also found who were the heir-at-law and next-of-kin of the testator, and they were made defendants by supplemental bill. The cause coming on for further directions, it was insisted, on the part of the informant and plaintiffs, and the next-of-kin, that the debts, legacies, and expenses must be borne by the different classes of property *pro ratâ*. This was resisted by the heir-at-law, on whose part it was contended, that the debts, legacies,

and charges ought to be paid out of the personal estate.

Mr. K. Bruce, Mr. Wakefield, Mr. Anderson, Mr. Piggott, and Mr. K. Parker, in support of the application *pro ratâ*, cited *Roberts v. Walker* (1), remarking that it was followed by *Johnson v. Woods* (2), shewing that this was clearly the rule of law at the Rolls.

Mr. Jacob and Mr. F. J. Hall, for the heir-at-law, cited

Ackroyd v. Smithson, 1 Bro. C.C. 503.

Fourdrin v. Gowdey, 3 Myl. & K. 383;

s. c. 3 Law J. Rep. (N.S.) Chanc. 171.

Williams v. Kershaw, 1 Keen, 274, n.;

s. c. 5 Law J. Rep. (N.S.) Chanc. 84.

THE VICE CHANCELLOR. — The only question is, whether the testator has by his will expressed any intention that the payment of his debts and legacies shall be governed by a rule different from that which, in the ordinary course, would be observed. I cannot find anything in the will to prevent the application of the estate for these purposes, according to the ordinary rule of law. In *Roberts v. Walker*, Sir J. Leach put his own construction on the words used by that testator. He says, "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes, and every of them, *pro ratâ*, according to their respective values." Upon this construction, the order in that case seems to have been made.

[The decree was as follows:—"This Court doth declare, that the costs, charges, and expenses already taxed and paid, and those directed to be taxed and paid as hereinafter mentioned, are a charge upon the testator's real estate and his personal estate savouring of realty, and his personal estate remaining after deducting therefrom such personal estate savouring of realty, and are payable thereout in proportion to the relative value of the several estates respectively. And this Court doth

declare, that the debts, funeral expenses, and legacies ought to be paid out of the personal estate savouring of realty, and the said remaining personal estate, in proportion to the relative value of these estates respectively. And this Court doth declare, that the defendant John Milner, as the heir-at-law of the said testator, is entitled to the produce arising from the sale of the said testator's real estate, subject to the charges hereinbefore declared, and the expenses of the sale thereof, as found, &c. And this Court doth declare, that the residuary bequest, subject to the annuity, &c., is void to the extent of that proportion of the residuary estate which consisted of the testator's personal estate savouring of realty. And this Court doth declare, that the next-of-kin of the said testator living at his death, were entitled to so much of the personal estate of the said testator as consisted of personalty savouring of realty."]

Beckwith v. Am. J. R. 49 L. 62 77.
M.R.
Nov. 9. } *J. J. Kennedy*
L.C. } *152 x 4 387*
Nov. 28, 1840. } CHADWICK v. BROAD-
M.R. } WOOD.
Mar. 20, 1841. }

Practice.—Pleading—Plea and Answer—Statute of Limitations, 3 & 4 Will. 4. c. 27.

A party, who claimed some real estate as heir-at-law, filed a bill of discovery against the parties in possession. A plea of the Statute of Limitations (3 & 4 Will. 4. c. 27), stating, that no rent had been paid for twenty years, but not alleging that rent had been paid to an adverse claimant, was overruled.

A plea being overruled, and leave given to the plaintiff to amend, and to the defendant to plead de novo, the plaintiff amended his bill:—Held, that the defendant was at liberty to put in a new defence by way of plea.

To a bill of discovery, filed by a party claiming as heir-at-law, the defendant put in a plea, insisting that the plaintiff was not heir of the party who died seised, and denying all the intermediate steps in the descent, from the alleged ancestor to the plaintiff, and that there was any descent, or

(1) 1 Russ. & Myl. 752.

(2) 9 Law J. Rep. (N.S.) Chanc. 244.

seisin in any of the parties:—Held, that this plea comprised several distinct matters, and was irregular.

Plea overruled by answer as to matters not material to displace the plea.

Whether a negative plea can be put in to a mere bill of discovery—quære.

The bill stated, that by certain indentures, dated in December 1717, and other indentures, dated in July 1720, certain hereditaments in the parish of St. James's, Westminster, were conveyed to Sir Andrew Chadwick in fee; that in 1766 Sir Andrew Chadwick granted a lease of part of these hereditaments for sixty years, at the annual rent reserved by such lease; and that he also granted divers other leases of the other parts of these hereditaments, which leases would expire at or about the same time as the lease of 1766, and within less than twenty years before the filing of the bill; but the particulars of which leases were not known to the plaintiff.

Sir Andrew Chadwick died in 1768, intestate, and the hereditaments descended on the plaintiff's grandfather, Joseph Chadwick, who was the eldest son of James Chadwick; which James was the elder brother of Ellice Chadwick, who was the father of Sir Andrew.

Joseph died intestate in 1790, when these estates descended to the plaintiff's father Thomas, on whose death intestate in 1801, they descended to the plaintiff. The bill alleged, that the various leases granted by Sir A. Chadwick expired at Midsummer, 1825, or within two years of that time; and that the hereditaments, comprised in the indentures of 1717 and 1720 respectively, became vested in the defendants (who were co-partners), for the residue of the terms of years, and that on the expiration of the terms the plaintiff was entitled to have possession of the hereditaments delivered up to him. The bill, as amended, alleged, that the defendants obtained possession of the hereditaments by virtue of the said leases, and had paid the rents reserved thereby, and taken receipts and written acknowledgments for the rents, which were signed by Sir A. Chadwick, Joseph and Thomas C, and the plaintiff respectively; and that though the others of such payments and

receipts were made to and signed by other persons, yet such other persons received those payments, and gave those receipts as agents for the said Chadwicks; and it contained a usual charge of papers, documents, &c.

The bill prayed for a discovery of all leases granted by Sir A. Chadwick, which were in the defendants' possession, and of all receipts for rent.

The defendants put in a plea, in which they stated the 2nd, the 1st clause of the 3rd, the 17th, and 34th sections of the Statute of Limitations, 3 & 4 Will. 4. c. 27; and they averred, that neither the plaintiff, nor any one under whom he claimed, nor any one for his use, was in the possession of or in the receipt of the rents or profits of any part of these hereditaments within twenty years before the filing of the bill; and that the plaintiff was not, within upwards of ten years before the filing of the bill, under any of the disabilities mentioned in the act; and they averred, that (Broadwood) the first named defendant and his then co-partner entered into possession of different parts of the hereditaments as purchasers of the fee simple in 1815, 1817, and 1819; and that in 1816, he (Broadwood) became entitled to the entirety, and that he and his former partner, or he solely, had had peaceable and uninterrupted possession ever since the purchase of the fee simple; and the other defendants were then in possession under an agreement for a lease from Broadwood. And the defendant pleaded the act of parliament, and such possession and enjoyment as aforesaid.

Mr. Girdlestone and Mr. Teed appeared in support of the plea; and cited—

Crouch v. Hickin, 1 Keen, 385; s. c. 6 Law J. Rep. (N.S.) Chanc. 153.

Hardman v. Ellames, 2 Myl. & K. 732; s. c. 3 Law J. Rep. (N.S.) Chanc. 74.

Mr. Pemberton and Mr. Bird, contra, contended, that the plea did not shew any adverse possession as against the plaintiff, because it did not appear that the rents had been paid to any adverse claimant; and also that the plea was multifarious, as it pleaded, first, the statute; and secondly, adverse possession.

Mr. Girdlestone replied.

Nov. 9.—**THE MASTER OF THE ROLLS**—(after stating the case).—If there were no such leases as are alleged in the bill, and the frame of these pleadings is such that the leases ought not in any way to be considered, then for anything that appears to the contrary, the plaintiff might have proceeded to recover possession at any time since 1801, when he alleges that his right first accrued; but if such leases are to be assumed to have existed, as they are stated in the bill, then the plaintiff's right to possession did not commence till the year 1825, and he could not by any means have recovered possession before that time. Certainly this bill does not make such distinct allegations as might be desired; but, taking the bill and the plea together, I am of opinion, that on the present occasion, I must assume that the leases were in existence, and consequently that the plaintiff's right to commence possession did not accrue till the year 1825, unless there be other circumstances which ought to determine the matter in another way. What the defendants say is, that they purchased about the year 1815, 1816, or 1817; and having purchased, entered into possession as tenants in fee—as owners of the fee and inheritance. Now, then, what does the statute say in that respect? When is the right to recover possession to be considered as having accrued? Not from the time any person dealing with the leases, or dealing with those who are entitled to the leases, gets possession, and claims to be entitled in fee; but from the time when the person who is claiming under the leases, under a mistake or otherwise, pays rent to persons who claim an adverse title; because then there is in those persons who received the rent under such claim—there is an adverse title really brought into operation against the party who claimed on the expiration of the lease. Then we come to the question, which is simply the question on this plea; for though very many other objections have been argued, and there are certainly very considerable objections in point of form—and I regret that, in the case of all pleas, there are many objections in point of form—but the question is, whether the facts which are alleged on this plea, are such as to bring the case within the protection of the

Statute of Limitations. The first-named defendant says he has paid no rent, and he entered into possession in 1815, 1817, or 1819, as a person entitled in fee; but he does not state that which the statute states, as the time at which the right of possession is to be deemed to have accrued. Therefore, in substance, I think, the plea cannot be allowed. Being of that opinion, I do not enter into the other points, it being unnecessary to do so.

His Lordship overruled the plea, with costs; but gave the defendants liberty to plead *de novo*, and also gave the plaintiff liberty to amend his bill, the bill to be amended within one fortnight from that time, and the defendants to put in their new plea within a fortnight from the time of the amendment, or from the time that the plaintiff should give notice that he waived such amendment.

The plaintiff appealed from so much of the order as gave the defendants liberty to plead *de novo*.

Mr. Wigram and *Mr. Bird* appeared in support of the appeal; and

Mr. Girdlestone and *Mr. Teed*, *contra*.

Nov. 28.—**THE LORD CHANCELLOR** said, that the Court would be very slow indeed to permit appeals on matters of discretion, whether they come from the Master's office, or from any other branch of the Court. Such matters involved no question of law; they furnished no precedent for any future case, and involved this inconvenience, that the Court was rehearing the merits of the case, in order to exercise a discretion; and if he had heard this case originally, he thought he should have come to precisely the same conclusion as the Master of the Rolls: that though this plea was informal, still it stated that which could not be true, unless there were real merits; and as the Court saw, upon oath, a statement which, if true, and if put in proper form, would be a defence, his Lordship thought it was right that the defendant should have an opportunity of making that defence. His Lordship therefore affirmed the decision of the Master of the Rolls.

The plaintiff then amended his bill, and introduced the allegation before referred to.

The defendant Broadwood put in a plea to the amended bill, and thereby pleaded that the plaintiff's grandfather, Joseph, was not, and that the plaintiff was not the heir-at-law of Sir A. Chadwick; and that these premises did not descend to Joseph, as the heir-at-law of Sir A. Chadwick, or to the plaintiff's father, as heir-at-law of Thomas, and that Joseph never became seised or entitled to the said premises, or any of them, as the heir-at-law of Sir A. Chadwick, and that Thomas never became seised or entitled as heir-at-law of Joseph, and that the plaintiff never became seised or entitled as heir-at-law of Sir A. Chadwick, or of Joseph or of Thomas, for that Ellice Chadwick, the father of Sir Andrew, never had an elder brother named James who left issue, and Joseph C. was not the son of any James C. who was a brother of Sir Andrew's father, Ellice Chadwick. And the defendant then answered part of the bill, which he had excepted out of his plea; and thereby denied that the defendants, or any of them, had in their possession any deeds, receipts, cases, or opinions of counsel, documents, &c. which, if produced, would tend to shew that the plaintiff's grandfather, Joseph, or the plaintiff, was heir-at-law of Sir Andrew, or that Joseph was the eldest son of James, or that James was the eldest brother of Ellice, or that, upon the death of Sir Andrew, the premises descended to the plaintiff's grandfather, Joseph, or that Joseph became seised or entitled, or that upon his death they descended upon the plaintiff's father, Thomas, or that Thomas became seised or entitled, or that upon the death of Thomas they descended to the plaintiff, or that the plaintiff became or has continued, or is seised or entitled as the heir-at-law of Sir Andrew, Joseph, and Thomas, or any of them.

Mr. Girdlestone and Mr. Teed appeared in support of the plea, and—

Mr. Pemberton and Mr. Bird, contra.

Sanders v. King, 6 Mad. 61.

Thring v. Edgar, 2 Sim. & Stu. 274;
s. c. 4 Law J. Rep. Chanc. 75.

Gun v. Prior, 1 Cox, 197.

Harland v. Emerson, 8 Bligh, 63.
were cited.

March 20.—The MASTER OF THE ROLLS (after stating the former decisions).—The plaintiff took advantage of the liberty which was given him to amend his bill; consequently, there was no longer any opportunity of pleading *de novo* to the original bill. But the amended bill having been filed, I conceive, that to that amended bill, the defendant had a right to make any defence which he is advised he can make available. He has put in a plea and an answer. I need not say, what is unfortunately too well known in the experience of every one, that that is a mode of defence which can with the utmost difficulty be sustained. It is not necessary for me at all to enter into the reasons under which that rule has been established, or the reasons which may perhaps be urged for the alteration of the rules which have been established. I must take the rules as they are, and endeavour to decide on them accordingly. If this plea does not succeed, I am quite sure it will not be from any want of care or attention, or any want of skill on the part of the pleader. I have heard quite enough to shew me, that every endeavour has been used to make a successful defence to this bill. Whether the defence is successful must depend on the nature of the allegations contained in the bill, and on the form and substance of the plea.

The bill alleges—[his Lordship stated the allegations as to the descent from Sir Andrew Chadwick]. Now, upon this occasion, I do not think it at all necessary to consider a question which has been argued, not as carefully as it would have been if it had been material, as to the validity of a plea of this sort to a mere bill of discovery. I mean to express no opinion whatever on that subject. I will assume now, that a plea in this form, a negative plea, may be a valid plea to a bill of discovery. Now, the plea which has been put in, is certainly very singular in its form. No doubt it was considered necessary to meet the allegations contained in the bill; but it is alleged to be a mere negative plea of "not heir." You, the plaintiff, claiming to have it as heir, are not heir; and therefore there is an end of your title. That is alleged to be the sum and substance

of the plea. The plea is to this effect, that the plaintiff's grandfather was not the heir of Sir Andrew, that the plaintiff is not the heir of Sir Andrew. Those are the allegations respecting the heirship, that neither was the grandfather the heir, nor is the plaintiff the heir. The plea then goes on, that the premises did not descend to Joseph, who was the grandfather, as the heir of Sir Andrew. It further proceeds, neither did they descend to Thomas as the heir of Joseph; neither did they descend to the plaintiff as the heir of Thomas. It further goes on, that Joseph, the grandfather, did not become seised as the heir of Sir Andrew, nor did Thomas become seised as the heir of Joseph, nor did the plaintiff become seised, either as the heir of Thomas, his father, or as the heir of Joseph, his grandfather, or as the heir of Sir Andrew, who was the lessor under whom he claims. Now, I take it to be quite clear, that the fact of his being heir, is consistent with the fact of there being no descent; that under certain circumstances, there may have been a descent without a seisin. These things are several matters: they are not all the same. It is not a single plea of 'not heir'; but it is 'not heir' with those several other circumstances annexed: not heir and no descent; not heir and no seisin. The plea ends with a reason, for that Ellice, who was the father of Sir Andrew, had no elder brother named James, or any brother named James who had or left issue; and Joseph, the grandfather, was not the son of any James, who was the brother of Ellice, the father of Sir Andrew.

It has been argued, and very ingeniously argued, that it really amounts to this, that the plaintiff is not descended from any James, who was the brother of, or from whom the descent could be traced from Sir Andrew. If that point had been brought forward on the plea, a single fact brought forward, which in tracing the general link of succession in the pedigree, had disproved the plaintiff's title in that way, or the general result had been simply stated "no heir," I should have been inclined to think that would have been good; and, subject to any objection raised on account of the other point, if it had been so stated,

I should have thought the plea ought to have been allowed. But it does not appear to me, a plea in this form is a good plea. It pleads matters which appear to me to be distinct and several, and which would doubtless have, as would be seen at once if this were a bill for relief, a totally different effect. Suppose this had been a bill for relief, and no heirship had been proved, there would have been then, or might have been a replication. Suppose it had been proved he was the heir, then the other facts, the descent and the seisin, would have been admitted; which evidently shews, I think, it is a plea of several matters. It is further objected to this plea, that it is erroneous in point of form; in fact, that it does not accomplish that which is rarely if ever accomplished, the union of a plea and answer free from objection, arising from the several rules which have been laid down. The rules have been quite agreed upon between the two parties. There is no difficulty at all in ascertaining what they are. The difficulty is in acting on them in each particular case. It may be said thus, "you are to answer everything charged in the bill, which, if true, would displace the plea; and this you are to do whether the bill be so framed as expressly to allege those matters to be evidence of the facts, or otherwise. If they are material for the purpose of displacing the plea, they are to be answered; and if they are not material for that purpose, you are not to answer them; for by so doing you overrule your plea according to the rule." Now, in this case it is said, the defendant has done too much or too little. There are certain receipts and acknowledgments for rent, which are stated in the bill to have been in the possession of the defendants here, and to be evidence of the matters charged in the bill, or some of them. There are also statements in the bill of the payments of rent made—the payment of that very rent for which these are the receipts, and the acknowledgments. The defendant has answered as to the receipts and acknowledgments, but he has not answered as to the payment of rent. Now, it is said, he has done either too much or too little in this. If he was bound to answer as to the receipts and acknow-

ledgments, then he has done too little; because, in the same case, he ought also to have answered as to the payments. On the other hand, if he was not bound to answer as to the payments, (and he has not answered as to them,) then he has done too much, because in that case he ought not to have answered as to the receipts and acknowledgments. Now, the distinction which has been drawn by Mr. Girdlestone on that point, is this: if I correctly collect the effect of his argument, it is to this effect:—He says, this is not the statement of a payment which you may apply to anything, but it is the statement of a payment which is used as evidence of a particular thing, and expressly so stated in the bill; and it is as evidence of tenancy, and not as evidence of heirship. I think he is mistaken as to that; for if you read the whole sentence, you can hardly find it out to be otherwise. The sentence is this, “the plaintiff is entitled to have the possession of the same premises respectively delivered up to him by the defendants.” How is he entitled, except only in the character of heir, which he claims? He says, he is entitled to have the possession of the premises delivered up to him by the defendants. “But the said defendants refuse to deliver up the same, notwithstanding they and the person or persons, through or under whom they claimed obtained possession of the said premises under or by virtue of the leases hereinbefore mentioned to have been granted thereof respectively. And as evidence thereof, the plaintiff sheweth, that the said defendants, and the person or persons through and under whom they claimed, paid the rents”: that is, as evidence that the plaintiff is entitled, and those persons refuse, notwithstanding he says this payment of rent was made. Now, I cannot separate that, even in statement. It is stated there as evidence of the plaintiff’s title; the plaintiff’s title consists in his heirship, and nothing else; and it does appear to me, therefore, even in point of form, if you got over the difficulties there are in point of substance, that this plea would have to be overruled.

M.R. { KNIGHT v. FRAMPTON.
Mar. 2, 3, 16. { FRAMPTON v. KNIGHT.

Dover.

The legal estate in certain freeholds was vested in K, as mortgagee in fee, subject to the equity of redemption of F. K. also claimed to be entitled to an undivided moiety in these freeholds, which claim was disputed by F, but was established by a decree at the Rolls, after K's death:—Held, that the legal and equitable interest had not been so united in K. as to entitle his widow to dower out of his undivided moiety.

In 1824, James A. Frampton entered into an agreement with Lord Petre, for the purchase of an estate at Axminster. Part of this estate was immediately sold off by Frampton to different parties, and the remainder of it was conveyed to Frampton in fee. An agreement had been entered into between Frampton and the plaintiff William Knight, that this purchase should be made on their joint account; and half the purchase-money paid by Frampton was supplied to him by Knight, and Frampton gave Knight a written acknowledgment that the purchase was made on their joint account.

The estate was conveyed to Frampton in fee, subject to certain portions charged in favour of Lord Petre's brother and sister, the amount of which Frampton retained in his own hands, without the knowledge of Knight. The former of these charges, and also part of the latter, were afterward paid off by Frampton.

In 1826, Frampton, without the concurrence of Knight, executed a mortgage in fee to Lord Petre and three other gentlemen, who were trustees, to secure 12,000*l.*, and he afterwards executed a further charge to the same parties for 6,000*l.*

Frampton died in 1834.

The plaintiff filed his bill in 1837 against the parties who claimed under Frampton's will, praying a declaration that the plaintiff was entitled to an undivided moiety of the estates, and that Frampton might be decreed to pay off all the charges and incumbrances thereon.

Knight afterwards paid off that part of the portion of Lord Petre's sister, which continued to be a charge on the estate,

and the monies due by virtue of the mortgage to Lord Petre and his co-trustees, and took a conveyance from Lord Petre and his co-trustees to himself (Knight) in fee, subject to such equity of redemption as Frampton was entitled to; and filed a supplemental bill stating these facts, and stating that he had paid off the mortgages, for the purpose of simplifying the matters in dispute between him and Frampton.

The defendant insisted that Knight was not entitled to an undivided moiety of the estate, but that he had merely a lien upon it for the amount of money which he had advanced.

Another bill was instituted by one of the devisees of Frampton against the representative of Knight and others, praying a declaration that Knight had merely an equitable lien on the estate for the money advanced by him; or, if the Court should consider him entitled to part of the estates, then that a partition might be made.

The widow of William Knight, by her answer, insisted, that as her husband was seised of the legal estate in the entirety, and was also equitably entitled to a moiety, she was entitled to dower in that moiety, and she also filed another bill, asking for a declaration, that she was entitled to dower out of an undivided moiety.

Mr. Pemberton, Mr. Kindersley, Mr. Stuart, Mr. G. Turner, Mr. Bethell, Mr. K. Parker, Mr. Faber, Mr. Phillips, and Mr. Elmsley, appeared for the different parties.

The MASTER OF THE ROLLS decided, that under the agreement between Knight and Frampton, the representatives of Knight were entitled to an undivided moiety of the estate; but refused to make any order for a partition, as the entirety of the estate was comprised in the mortgage; and he reserved his judgment as to the question of dower.

March 16.—The MASTER OF THE ROLLS, after stating the facts of the case, said, that he was of opinion that there was not such a perfect union of the legal and equitable estates in Knight—not such a seisin—as gave the widow a title to dower, and therefore her claim to dower could not be sustained.

L.C.
Nov. 6,
1840.
Jan. 20; Mar. 19,
1841.

} *In re COATES'S PATENT.*

Patent—Caveat—Costs.

Where a caveat had been lodged against the sealing of a patent, and the intended patentee had been compelled to present a petition to the Lord Chancellor, praying that the patent might be forthwith sealed, which was unsuccessfully opposed by the party who had lodged the caveat, it was held, that his Lordship had only jurisdiction to give to the petitioner the costs, and not the costs, charges, and expenses, of and occasioned by such caveat and opposition to the petition.

In this case, a caveat was lodged at the Great Seal Patent Office, by Messrs. N. & Co., to prevent the petitioner Coates's patent for "improvements in the forging of bolts, spikes, and nails," being sealed. The ground of objection was the want of novelty in the invention. In August 1840, Coates presented his petition to the Lord Chancellor, praying that the caveat might be discharged, and the patent forthwith sealed, and that Messrs. N. & Co. might be ordered to pay the costs, charges, and expenses of and occasioned by the application. On the 6th of November 1840, His Lordship referred the matter back to the Attorney General, to inquire and state whether the petitioner's intended patent did or did not exclude certain machines and the improvements (if any) which were in dispute in a particular suit, and the petition was ordered to stand over till after the Attorney General's report. On the 13th of January 1841, the Attorney General, in pursuance of the reference to him, reported that he was of opinion, that the petitioner's intended patent did include the machines and the improvements which were in dispute in the suit mentioned in the order of reference made to him. On the 30th of January 1841, the petition having been again brought on, the petitioner asked of his Lordship an order, that the patent might be forthwith sealed and tested as of that day, and that the respondents might pay the petitioner's costs occasioned by the caveat and petition, and consequent

thereon. In support of the application, an order made by the Lord Chancellor, *In re Cutler's Patent* (1) was cited, in which doubts having been expressed, whether the Lord Chancellor had jurisdiction to order the payment of the costs, his Lordship desired the point to be investigated, when it was ascertained, that the Lord Chancellor had jurisdiction to give costs, and he accordingly gave the costs occasioned by the *caveat*, &c. to the petitioner, the patentee. The petitioner having in his petition prayed an order for payment to him of his *costs, charges, and expenses*, and the Lord Chancellor's secretary having drawn up his Lordship's order in those terms, on the 19th of March 1841, the petition was again set down to be spoke to on the form of the order as to costs. It then appeared, that in the case of *Cutler's Patent*, the petitioner had prayed to be paid his *costs and expenses*, but the Lord Chancellor only gave him his *costs*; and a petition having been afterwards presented in that matter to the Lord Chancellor, praying the extension of his Lordship's order of costs, to costs, charges, and expenses, the same was dismissed, with costs.

Mr. Wigram, on behalf of the petitioner, now stated, that unless his Lordship gave the petitioner (*Coates*) his *costs, charges, and expenses*, he would be subject to very heavy expenses occasioned by the other party, which the petitioner could never recover; that the Lord Chancellor, in referring to the case of *Cutler's Patent*, when he pronounced his order, on the 30th of November, only referred to it as an authority in favour of his having jurisdiction to give costs, and not as to the particular form to be drawn up on that point.

Mr. Sutton Sharpe, *contra*.

The LORD CHANCELLOR said, that in the present case, as in all litigated cases, the successful party could only have such costs as the law allowed, and that there was no ground shewn in the present case for enlarging the costs ordinarily given, to costs, charges, and expenses, any more than in any other case.

(1) Not reported.

V.C. }
Mar. 10, 13, 15. } TURNER v. TRELAWNEY.

Bankrupt, Purchase by Assignees of—Trust—Shares in Mine.

The bankrupts were the owners of certain shares in a mine, but the mine was liable to debts which had been incurred in working it. The assignees of the bankrupts renounced their interest in the mine; and by a decree in the Stannaries Court, the mine was ordered to be sold, and the purchase-money applied in payment of the debts. Certain new adventurers agreed to become the purchasers, and paid the purchase-money in shares. One of the assignees of the bankrupts subscribed for some of the new shares, in the name of "himself and friends." Four of the shares thus subscribed for by the assignee were taken by the defendant:—Held, that the defendant was a trustee of the shares, and the subsequent profits, for the benefit of the creditors of the bankrupts.

This case arose out of the circumstances which are stated in the case of *Turner v. Borlase* (1).

In January 1820, a joint commission of bankruptcy issued against T. and J. Gundry. Amongst the property of the bankrupts were certain shares in a mine, situated in the county of Cornwall, which passed to their assignees, H. M. Grylls and C. Read. In the month of February, after the bankruptcy, at a meeting of the adventurers in the mine, it was resolved, that a petition by a creditor of the mine should be presented to the Vice Warden of the Stannaries, for liberty to make sale of the mine; and it was determined, in the event of such a sale being had, that the proceeds should be applied in payment of the debts which had been incurred in the adventure, and which were then very considerable. A few days after these resolutions had been come to, Grylls and Read, the assignees, executed an instrument, purporting to be an absolute relinquishment of the shares of the bankrupts in the adventure. After further deliberation among the adventurers, they ultimately resolved, after effecting a sale of the mine, to reconstruct the undertaking, by creating new shares, to be distributed amongst the old adventurers, and

(1) Reported *ante*, p. 26.

new adventurers who were to be admitted. In March, in the same year, an amicable suit, by a creditor of the mine, was instituted in the Stannaries Court, upon which, in May, a decree for sale was made. In June, the mine was sold, and Grylls, on behalf of the new adventurers, bought the mine, for the sum of 18,000*l.*, there being no other bidding. Grylls was a subscriber for eleven fifty-eighth shares in the new adventure, which he described in the list of shareholders as being held "for himself and friends." Four out of the eleven shares thus taken by Grylls were assigned to certain trustees, for the benefit of the defendant Trelawney, at that time a minor, but who afterwards came of age, and accepted the purchase. A renewed commission of bankruptcy was sued out in 1829, against T. & J. Gundry; and the assignees under that commission filed their bill, impeaching the transaction by which the defendant (Trelawney) had become the purchaser of the four shares, on the ground, that the shares of the bankrupts as adventurers in the mine, had been improperly relinquished, and praying, that the defendant (Trelawney) might be declared a trustee for the plaintiffs, in respect of the four shares, and of the profits which had accrued.

Mr. Jacob, Mr. Richards, and Mr. Follett, for the plaintiffs.—The assignee of a bankrupt is not permitted, at least without leave previously obtained, to become the purchaser of any part of the bankrupt's estate, either for himself or others; and this objection applies still more strongly in a case where the transfer of the bankrupt's property is effected through a series of transactions, all of which are accomplished by means of his agency. The consequence is, that the assignee or his nominee or vendee, with notice, is a trustee of the property so obtained, and of the profits produced by it.

Ex parte Bennett, 10 Ves. 381.

Ex parte Badcock, Mont. & M'Ar. 231.

Ex parte Grylls, 2 Dea. & Chit. 291.

Wedderburn v. Wedderburn, 4 Myl. & Cr. 41; s. c. 8 Law J. Rep. (N.S.) Chanc. 177.

Crawshay v. Collins, 15 Ves. 218.

Cooke v. Collinridge, Jac. 607.

Greenlaw v. King, 9 Law J. Rep. (N.S.) Chanc. 377; and *ante*, p. 129.

Mr. K. Bruce, Sir W. W. Follett, Mr. Sharpe and Mr. Steere, for the defendant, relied chiefly on the *bona fides* of the transaction; and on the fact that the defendant was a purchaser for valuable consideration, and could not be taken to have had notice of any infirmity in the title arising from the circumstances now brought forward. They argued, that equity would not interfere in behalf of parties holding back until a mining speculation had become profitable, and then claiming the benefit of that labour and risk of which they had not borne any part—*Norway v. Rowe* (2).

Mar. 15.—The VICE CHANCELLOR.—I confess I do not see what time has to do with a case like the present, which appears to me to be one of the simplest ever brought before a court of equity. There has been a great deal of evidence read, but the case is in a very small compass. As I understand the case, Grylls, for general purposes, took active measures in regard to the mine. There is no doubt but the motives were good: it appears, on the letters, that he was anxious, in a general view, that the mine should go on. Shortly after he appears to have entertained this feeling for the prosperity of the mine, the Gundrys became bankrupts, and Grylls was chosen assignee. It was thought proper that various measures should be adopted, and among others, that a relinquishment should be made of the interest of the Gundrys in the mine. Had it stopped there, there would have been nothing to complain of; but the matter did not stop there, and was not intended to stop there. The parties go on to construct a new company, into the mass of which was to be thrown the property which the Gundrys had. It appears that Mr. Grylls became proprietor of eleven fifty-eighth shares, taken as it appears for himself and friends: by which I understand, if any friends were willing to go shares with him, they should be at liberty to do so; if not, he was willing to take the whole for himself. Before the end of March, there was some discussion between Grylls and Woolcombe, about the shares which should be taken for the defendant Trelawney, but nothing definite was then

(2) 19 Ves. 149.

done. The matter was to be the subject of further consideration. There was to be an inquiry, whether it would be beneficial to take shares.—[His Honour read some part of the correspondence between Grylls and Woolcombe, as to the eligibility of the purchase for Trelawney.]—It appears, that an inquiry was made by Day, who was named by Mr. Woolcombe; and that Woolcombe went down to see the mine. The result is, that it seems to have been understood between Woolcombe and Grylls, that Woolcombe should take for Trelawney four of the shares, which were marked as accepted by Grylls, "for himself and friends." The rest is mere machinery. The real nature of the transaction was this: 18,000*l.* was to be the amount of the purchase-money for the mine, and this sum to be contributed at the rate of 333*l.* 6*s.* 8*d.* for each share. I notice that, because it appears by the subsequent letters, written at the close of the year, that there were actually paid by Sylvester and Woolcombe sums which together made 1,333*l.*, the apportioned value of four shares. It was not a purchase from Grylls, but a transaction by means of which, when Trelawney or his trustees paid 1,333*l.*, they merely paid a proportionable part of the whole purchase-money, which was equivalent to the four shares. It was not a case in which Grylls first in any way became the owner of the shares, and being so, by a distinct contract, transferred them to a purchaser. It is impossible to look at all the circumstances of the case, and not to see that the ultimate payment by Trelawney was nothing more than an adoption of the original transaction, as entered into by Mr. Grylls. I dwell upon that the more, because it puts an end to all questions concerning notice. It is plain, that from the beginning, Mr. Grylls was merely an agent, and his knowledge must affect those for whom he was acting as agent; the defendant and Trelawney must be considered as holding with notice a portion of the bankrupt's interest in the mine,—a portion of that interest which originally consisted of eleven fifty-eighth shares in the whole. It follows, that he must be decreed to account, making him all just allowances for his necessary expenditure.

M.R. }
Mar. 27, 29. } FENNINGS v. HUMPHERY.

Agreement—Specific Performance—Practice—Order to elect to proceed either at law or in equity.

A party filed a bill for the specific performance by the lessor of an agreement for a lease, and brought an action at law against him for damages, which had accrued up to the commencement of the action, from the non-performance by the lessor of certain parts of his agreement:—Held, that the action and suit were not for the same matter, and might both be continued.

An order was obtained by a defendant, that the plaintiff should elect within eight days, whether he would proceed at law or in equity, but was afterwards discharged, on the ground, that the suit and action were not for the same matter:—Held, that the order did not operate to stay all proceedings during the eight days in which the plaintiff was to make his election.

On the 13th of May 1837, a written agreement was entered into between the plaintiff, Eliza Fennings, and the defendant John Humphery, by which the defendant agreed to let to the plaintiff a cellar under some warehouses near London Bridge, with the lower floors of the two adjoining vaults, all which were then in the occupation of the plaintiff, for seven years and a quarter, from Lady-day 1837, at the yearly rent of 150*l.*, to be paid quarterly; and the defendant also agreed, within eighteen months from Midsummer 1837, to finish and give the plaintiff possession of a vault therein referred to, and to erect a crane in the said vault, for the sole use of the plaintiff, which last-mentioned vault was to be held by the plaintiff for seven years after possession of it was given to her, at the yearly rent of 50*l.*; and the defendant agreed to execute a lease to the defendant, if required so to do; which lease was to contain usual covenants on the part of the lessee.

Eighteen months had expired, but the defendant had not done any of the works which he had contracted by his agreement to do. On the 12th of September 1839, he commenced an action of debt against the plaintiff, for a year and a quarter's rent; and on the 19th of October 1839,

he commenced another action for another quarter's rent.

On the 24th of December 1839, the plaintiff filed this bill, praying that the agreement of the 13th of May 1837 might be specifically performed; and that the defendant might be ordered to execute a lease of the premises comprised therein; and that he might be restrained by injunction from prosecuting his said actions, and from all proceedings at law, in respect of rent of the said premises.

Shortly afterward, the plaintiff obtained the common injunction for want of answer, restraining the defendant from taking out execution in his actions for rent.

On the 27th of January 1840, the answer was filed; and no further proceedings were taken on either side till the 20th of February 1841, when the defendant obtained the usual order *nisi* to dissolve the common injunction.

On the 26th of February 1841, the plaintiff commenced an action against the defendant, for damages arising from his breach of the agreement. The declaration in this action was delivered on the 6th of March, and it assigned as breaches of the agreement, that the defendant had not excavated the vault;—secondly, that he had not erected a crane, and that he had not made the necessary repairs.

On the 11th of March, the defendant, alleging that he was doubly vexed, obtained the common order for the plaintiff to elect, within eight days, whether she would proceed at law or in equity; and this order was served on the 13th of February.

On the 15th of March the plaintiff made an application before Mr. Baron Alderson, at chambers, in the action at law.

Two motions were now made in the cause, one on behalf of the plaintiff, that the order to elect should be discharged, and the other, on behalf of the defendant, that the order *nisi* to dissolve the injunction should be made absolute.

Mr. Pemberton and *Mr. Jemmett* appeared for the plaintiff.—The bill asks, that the agreement for a lease may be specifically performed, and that the plaintiff may thus be protected from future injury. But the action which she has brought, seeks compensation for damages which have been already sustained. The object, therefore,

of the suit is quite distinct from the subjects of complaint, which form the ground for the action at law.

Pritchett v. Boevey, 1 Cr. & M. 775; s. c. 2 Law J. Rep. (n.s.) Exch. 251.

Bristowe v. Fairclough, 1 Scott, N.R. 161; s. c. 9 Law J. Rep. (n.s.) C.P. 245.

Nelson v. Bridges, 2 Bea. 239.

Mundy v. Jolliffe, 9 Sim. 413; s. c. 8 Law J. Rep. (n.s.) Chanc. 62, and 9 Law J. Rep. (n.s.) Chanc. 95.

Mortlock v. Buller, 10 Ves. 292.

Malachy v. Soper, 3 Bing. N.C. 371; s. c. 6 Law J. Rep. (n.s.) C.P. 32.

Hodgson v. Stallebrass, 3 Per. & Dav. 37; s. c. 9 Law J. Rep. (n.s.) Q.B. 132.

Orme v. Broughton, 10 Bing. 533; s. c. 3 Law J. Rep. (n.s.) C.P. 208.

Mr. Bethell and *Mr. Dunn*, contra.—The action and the suit of the plaintiff are both founded upon the alleged breach of the agreement on the part of the defendant, who will be doubly harassed if they are both prosecuted. The plaintiff is also in possession of the existing vaults, and ought to pay rent for those vaults, although the defendant has omitted to complete a new vault.

Carrick v. Young, 4 Mad. 437.

Frank v. Basnett, 2 Myl. & K. 618.

Reynolds v. Nelson, 6 Mad. 290.

She has also taken a step in the proceedings at law after service of the order to elect; and must, therefore, be held to have elected to go on with her action at law.

Mills v. Fry, Coop. 107; s. c. 19 Ves. 277.

Amery v. Brodrick, Jac. 530.

Carwick v. Young, 2 Swanst. 239.

Mr. Pemberton, in reply.—An order to elect within eight days does not preclude a party from taking any steps till those eight days are expired—*Trimleston v. Kennies* (1).

Mar. 29.—The MASTER OF THE ROLLS.—This is a motion to discharge an order obtained as of course, whereby the plaintiff is required to elect, whether she will proceed in this court or in her action at law, which is alleged to be for the same

(1) Llo. & Gou. Rep. Temp. Sugd. 29.

matter. The plaintiff has shewn cause why an order *nisi* for dissolving an injunction which she had obtained, should not be made absolute. The case is—[His Lordship stated the case].—On this occasion, I am not to consider whether the defendant may have any equity to restrain the plaintiff from proceeding in equity, otherwise than that the action and this suit are for the same matter. Whatever other grounds for relief he may have, the order he has obtained cannot be supported, unless they are for the same thing. If by the action she sought for compensation for non-performance of the agreement, and by the bill she seeks for its specific performance, the two proceedings would be inconsistent with each other. The plaintiff would in one court be suing for the thing itself, and in the other be suing for damages for the thing itself; she would be proceeding against the party for one and the same matter. But considering the allegations in this bill, and the relief specifically prayed; the nature of the action; the particulars of the agreement, and what parts of it this Court cannot decree to be performed in specie; and considering that the action is brought for non-performance, in respect of the particular acts which are not specifically mentioned in the bill, and which the Court cannot decree to be specifically performed; and that the action is brought for such damages as were incurred up to the time of the action being brought;—under these circumstances, the two proceedings do not appear to me to be prosecuted for one and the same matter.

But it has been argued, that if the order to elect was not originally valid, still the plaintiff, by proceeding at law after the order was obtained, has waived any objection that might have been made. She is not to determine for herself, but ought to come to the Court: and the argument in this case seems to be, that the order for the plaintiff to elect operates as an injunction from the time it is served; and that any proceedings at law or in equity after the service, would be treated as a contempt of the Court; or that the plaintiff may be considered to have thus made an election to proceed in the action.

There are several *dicta*, that an order to elect stays all proceedings. It may be

necessary to consider this point under different circumstances; but on this occasion, I am of opinion, that the argument, that she is not at liberty to move to discharge the order, cannot be sustained. Lord Eldon, in *Mills v. Fry*, expressed a doubt whether the plaintiff having proceeded in equity, after an order to elect, ought to have the benefit of the order; that is, supposing the order to be valid, Lord Eldon doubted whether proceedings in any court might not be considered as an election depriving the party of the benefit of future choice. But this does not amount to an intimation, that a party could be so bound where the order ought to be deemed invalid; nor in cases where he shews to the Court that he ought not to be compelled to elect. The plaintiff here is at liberty to proceed with the action as well as the suit, and the order was not valid; and I am of opinion, that it must be discharged.

But then if the question as to the prosecution of the suit and the action at the same time, had not been brought forward in this particular case, there are many other circumstances which would have required consideration, before it could have been satisfactorily held, that the two proceedings could go on together. If the plaintiff will undertake not to take out any execution on any judgment she may recover at law, and undertake to pay the rent into court, if required, I will continue the injunction against the proceedings of the defendant in his actions, without a new order.

M.R. } THE KING OF HANOVER
Mar. 22; April 1. } v. WHEATLEY.

Practice.—*New Commission to cross-examine Witnesses after Return of former Commission.*

Witnesses had been examined abroad by the plaintiff, under a commission, which was returned. The defendants had not cross-examined them. A new commission was granted to enable the defendants to cross-examine those witnesses, upon an affidavit, that the defendants had, since the return of the commission, discovered new matter material for the cross-examination.

The rules upon which the Court acts in granting new commissions, and the authority and duty of commissioners.

In this suit a commission had issued for the examination of witnesses, in which the defendants did not join. Two ladies residing at Hanover had been examined on behalf of the plaintiff, and the commission was closed in December 1840, and was returned into court in the first week of January 1841. The rule to produce witnesses was given on the 16th of January, but the rule to pass publication had not yet been given.

A motion was now made on behalf of three of the defendants, that they might have a commission to cross-examine the two witnesses, before referred to, at Hanover or elsewhere.

An affidavit was made, in support of the motion, by the defendants' solicitor, stating, that since the execution of the commission, and the return thereof, he had discovered new matter, which he believed to be material for the cross-examination of the two witnesses before referred to, which was not known to him or to the defendants until after the return of the commission.

Mr. Wigram and Mr. Wray, in support of the motion, insisted, that the Court had a discretionary power in cases of this description, and referred to—

Lord Bacon's Orders, in Beames, p. 30.

Turbot v. —, 8 Ves. 315.

Campbell v. Scougal, 19 Ves. 552.

Carter v. Draper, 2 Sim. 52.

Bond v. Bond, 4 Sim. 518.

Sir Charles Wetherell, Mr. Pemberton, and Mr. Loftus Wigram, for the plaintiff, did not oppose the motion, but merely offered some suggestions as to the terms and conditions of the order—*Vaughan v. Worrall* (1) was referred to.

Some difficulty having arisen in settling the terms of the order, the case was again mentioned to the Master of the Rolls on the 30th of March, when the following additional authorities were referred to:—

The Dean and Chapter of Ely v. Warren, 2 Atk. 189.

The same v. Stewart, ibid. 44.

Smith v. Biggs, 5 Sim. 391.

(1) 2 Mad. 322.

A discussion took place, whether the defendants were to be confined to a cross-examination of the two witnesses, or whether they might examine them on new matters; and, also, whether the plaintiff might re-examine the witnesses.

April 1.—THE MASTER OF THE ROLLS.
—Since this case was last mentioned, I have caused the registrar's book to be searched, and I have obtained copies of several orders, in which new commissions for the examination of witnesses have been directed to be issued. The order of *Campbell v. Scougal*, as it was at first pronounced, seems to me to be the only one, the form of which is applicable to the present case.

In that case of *Campbell v. Scougal*, application was made by the defendants to suppress the depositions taken at Leghorn on behalf of the plaintiffs, and the order, as it was at first pronounced, was to this effect, "Let the defendants be at liberty to sue out a new commission for the cross-examination of the plaintiffs' witnesses at Leghorn, returnable without delay; but they are not to examine any new witness under the said commission; and the commissioners to be named in such commission are to be at liberty, if necessary, to swear one or more interpreter or interpreters," and so on—the common direction. And then there was ten days notice to be given of the execution of such commission to any two of the plaintiffs' commissioners, in case the plaintiffs joined in such commission. "And it is ordered, that the depositions of the witnesses already examined be kept close; and the defendants are to state, upon affidavit, the names of the witnesses they mean to cross-examine, and to undertake to cross-examine such witnesses."

This was the order pronounced by Lord Eldon, adversely between the parties. On a subsequent day, the 7th of March, an application was made to vary the minutes of that order, and upon that application, special clauses were introduced, which do not appear to be applicable to the circumstances of the present case. One special clause was this, "But in case the plaintiffs' witnesses shall not attend to be cross-examined, having due notice, the defendants

are at liberty to make proper affidavits, before the proper authority at Leghorn, to prove their refusal." And there were directions given, as to the use which was to be made of these affidavits at law; and there was this direction, "The said commission is not to be directed to any of the commissioners named in the former commission."

It appears from the registrar's book, that these clauses were clauses which were introduced in the order made by consent upon an application to vary the minutes; and I think that this order, as originally made, affords a precedent for the order which may be made upon the present occasion.

But it is desired, on behalf of the plaintiff, that he may have leave to re-examine his witnesses upon the former interrogatories, or upon new interrogatories to be exhibited at the execution of the commission to be now issued; and it has become necessary, therefore, to consider what is the practice as to exhibiting fresh interrogatories for the examination of witnesses under the commission. There is not, I apprehend, any doubt either as to the general practice or the general authority by which that practice is supported. In the old orders made upon this subject—the orders of Lord Bacon—the examination of witnesses was to be upon interrogatories annexed to or inclosed in the commission alone. But afterwards it became a general practice, by consent, as it seems, to examine witnesses upon interrogatories exhibited to the commissioners on opening the commission. This appears to have been introduced by consent, and to have become the practice by consent, from what is stated in *Gilbert's Forum Romanum*, as well as in *Cursus Cancellarius*. But afterwards, in the oath settled by Lord Macclesfield and Sir Joseph Jekyll, the oath to be taken by the commissioners before acting in the commission, it is expressed that they are to examine on the interrogatories then produced, and left with them. Since that time the practice has been to produce the interrogatories at the time of opening the commission; and it appears to me, that the counsel, in the case of *Campbel v. Scougal*, misinformed Lord Eldon, when they told him it was the

practice to feed the commissioners with fresh interrogatories from time to time. Lord Eldon stated that to be contrary to his notion of what the practice was; and it appears clear, from the authorities then looked into, that he was then misinformed.

The practice seems to be thus—that on the examination of witnesses before the examiner, new interrogatories may be from time to time exhibited, for the examination of the same or other witnesses up to the time of publication, but that for the examination of witnesses before commissioners, by leave of the Court, it may be, that new commissions may be issued at the instance, or new interrogatories may be exhibited on behalf, of persons who might, by proper diligence and attention, have examined the witnesses on the execution of the first commission. This appears to have been settled in a case reported in *Gilbert's Reports*, p. 42, *Andrews v. Brown*, which is also reported in *Precedents in Chancery* (2). Now, on such occasions, that is, where applications are made for new commissions, or for leave to exhibit new interrogatories, the Court may adopt such precautions as may be thought proper, according to the circumstances of the case, and may make such order as shall be required for the purpose of setting the party right on costs. In the case of *Coventry v. Coventry*, in which I have obtained a copy of the order, and which is, I think, reported in *Dicken's Reports* (3), it was there thought right to refer it to the Master to settle the interrogatories, and to make them extend so far as they properly arise from the matters in issue, and no further. However, that is the only case in which I have found any such order as that to have been made.

In the present case, all that is asked is leave to cross-examine witnesses that have been already examined by the plaintiff, and they are named in the application which is made; and in the absence of any special case, I do not think it necessary or right to do more than make an order similar to that which was made in *Campbell v. Scougal*. I do not think that it would be consistent with the practice of the Court, or the principles upon which the Court

(2) Page 386.

(3) 1 Dick. 25.

appears to have acted in such cases, to permit the plaintiff to re-examine his witnesses in chief, upon the interrogatories already exhibited. But it appears to me, that the plaintiff is entitled upon a special case to exhibit new interrogatories for the examination of other witnesses, as to any matters in issue in the cause, and even for the examination of the same witnesses to matters in issue in the cause, which were not comprised in the former interrogatories. If any such special case were made, the commission would not be such as is asked for in this case, namely, merely as to the cross-examination of the plaintiff's witnesses; but it would be for a commission, in which both the plaintiff and defendants being jointly interested, the object would have to be so stated, and the expense would have to be borne in the usual way. If no such special case be made (and I do not think the circumstances constitute a special case), the order must be such as was pronounced in the case of *Campbell v. Scougal*, before the special direction was introduced by the consent of parties.

His Lordship afterwards made the following observations :—

I have endeavoured, upon this occasion, to inform myself, as well as I could, of the authority of the commissioners. The foundation of it seems to be a case reported in *Coke's Reports*—a case in the Star Chamber—but admitted to be, in all respects, so far as the commission to examine witnesses was concerned, similar to cases in the Court of Chancery, and you will find it referred to in the fourth *Institute*. The case arose there upon this, that upon the examination of witnesses, one witness was desirous of saying something that was material to the matter in question, but that particular thing not being mentioned specifically in the interrogatory, the commissioner for the other party interposed to prevent his saying it; and that being brought before the Court of Star Chamber, it was not only looked upon as irregular practice, but as a considerable offence. He had interposed to prevent material information being given. Now, that was not right, I conceive, for this reason—that the witness was, of course, to tell the whole truth; it was the truth relating to the matter, which he had no right to suppress or keep back in any

way. But, generally speaking, though it is the duty of the commissioner to see that that which the witness states is stated fully, and by no means to interfere, so as to prevent him stating that which belongs to it, yet he is to examine him upon the interrogatories, and, in that respect, his duty is merely ministerial. There is nothing but a ministerial duty in doing that. If the witness expresses himself imperfectly or ambiguously, I conceive it is the duty of an honest commissioner to put forward that in a proper form, but then he must do it for the purpose of satisfying his own mind, that that which the witness means to say, is clearly said. I conceive that he has not authority to go back to the original interrogatories, and to examine the witness upon those interrogatories, but that it is his duty, if anything is imperfectly or ambiguously expressed by the witness, to desire him to state that clearly. That is the impression I have.

The order was as follows :—

That the defendants be at liberty to take out a commission for the cross-examination of C. B. and S. B. in the kingdom of Hanover, returnable in five weeks from the date thereof, the said C. B. and S. B. having been already examined as witnesses for the plaintiff under the commission sued out by him; and the plaintiff's clerk in court is to be at liberty in six days after notice hereof, to join and strike commissioners' names with the said defendants' clerk in court, or in default thereof, the said defendants are to be at liberty to take out such commission directed to their own commissioners. And it is ordered, that the said defendants, and also the plaintiff, in case he shall join in the said defendants' said commission, be at liberty to name eight commissioners on each side, with liberty for each side to strike out four of them. And it is ordered, that the defendants also be at liberty to take out a duplicate of such commission; and in case the plaintiff shall join in such commission, he is to be at liberty to take out a duplicate thereof. And it is ordered, that fourteen days' notice of the execution of the said commission to the plaintiff's commissioners, or any two of them, be deemed good notice to the said plaintiff. And the

said commissioners, after they have entered on the execution of the said commission, are to be at liberty to swear one or more interpreter or interpreters, &c., and to return the depositions in the English language, and to keep such depositions secret until publication shall duly pass in this cause. And the said commissioners are to certify in what manner they administered the oath or oaths to such witness or witnesses respectively that shall be examined under the said commission, who cannot understand or do not speak the English language. And it is ordered, that the defendants do pay the plaintiff's costs of and relating to this application, and of the said commission and the execution thereof, including the costs, travelling and other expenses, of the plaintiff's commissioners and solicitors going from this country to Hanover and returning, attending the execution of the said commission, such costs, &c. to be taxed, &c. But this is to be without prejudice to the plaintiff's right to enter his rule and to pass publication, and to set down the cause for hearing in the same manner as if this order had not been made.

M.R. }
Jan. 25. } WOOD v. HITCHINGS.

Practice.—Pleading—Bill of Discovery—Answer—Insufficiency.

** A bill was filed for relief, and for discovery of many facts not material to the relief:—Held, that the plaintiff was not entitled to answers to interrogatories, which related to facts not material to the relief; and that, notwithstanding the defendants had answered some of such immaterial interrogatories, on the ground that they contained imputations upon their character.*

Whether a party who has presented an appeal to the Privy Council, can sustain a bill in this court for discovery of further evidence of the matters to be adjudicated upon by the Privy Council—quære.

The bill stated two papers, dated in December 1834, and signed by Mr. James Wood, which, it was contended, constituted his will, and in which the plaintiff and three other gentlemen were named as

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executors and legatees; that James Wood died in April 1836, and that shortly afterwards these two papers were propounded by the plaintiff and the three other gentlemen, who were named as executors, in the Prerogative Court of the Archbishop of Canterbury, but their validity was disputed by the next-of-kin; that soon afterwards Mr. Helps, one of the defendants, propounded another paper, dated in July 1835, as a codicil to the will of J. Wood; that in February 1839, the Chief Judge of the Prerogative Court pronounced against the validity of these various papers, thereby deciding that, so far as regarded those papers, James Wood died intestate; that the plaintiff and two other of the parties named as executors appealed from this decision to the Privy Council; and that in June 1836 limited letters of administration to the effects of James Wood, pending the suit in the Prerogative Court, were granted by the Court to Edwin Maddy, which administration determined when that suit ended.

This bill was filed on the 3rd of August 1839, by Sir Matthew Wood, against the other three executors, the next-of-kin, the legatees named in the codicil of July 1835, and Maddy; and it prayed for a discovery of the matters therein mentioned, and that the personal estate of the said testator, in the hands of Maddy, and all other the personal estates of the testator remaining outstanding, might be secured by the Court pending the said appeal, and any other proceedings in the Privy Council or the Prerogative Court, touching the matters aforesaid, and until a legal personal representative of James Wood should have been duly constituted; and that in the meantime some proper person might be appointed to sell and dispose of the said testator's stock in trade, &c. remaining unsold, and to get in and receive the outstanding personal estate of the testator, and the rents and profits of his leasehold estates, and the dividends of stock; and, if necessary or proper, that an account might be taken of the receipts and payments of Maddy, in respect of the personal estate of the testator.

Four of the defendants put in a joint answer, to which seven exceptions were taken for insufficiency, on the ground that

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the defendants had not answered several interrogatories, with regard to the statements they had heard, and with regard to their suspicions and belief respecting the different testamentary papers, which James Wood was stated to have made, and with regard to the destruction of many papers of that description, which were reported to have been destroyed; and with regard to the information which they possessed respecting those documents, and the matters which had been in dispute in the Prerogative Court, and which were to be adjudicated upon by the Privy Council; and with respect to an arrangement which was alleged to have been come to between the defendants; and also that the defendants had not set forth a schedule of the statements, notes, memoranda, &c. which were in the possession of them, or their solicitors, respecting the matters mentioned in the bill. The defendants had answered several interrogatories which related to these matters, on the ground that the allegations or charges on which they were founded contained imputations on the moral propriety of their proceedings; but they insisted they were not bound to answer those interrogatories, and particularly that they ought not to set forth any statements of such information, documents, &c. as they had obtained since the commencement of the suit.

The Master had overruled the exceptions, and the cause now came before the Master of the Rolls, upon exceptions to the Master's report.

Sir Charles Wetherell, Mr. G. Turner, Mr. Bethell, and Mr. Walker supported the exceptions, and

Mr. Pemberton, Mr. Kindersley, and Mr. S. Sharpe, appeared for the defendants.

The points which were submitted for the decision of the Master of the Rolls, are stated in the judgment.

- **THE MASTER OF THE ROLLS.**—This case has been argued with great ability, and is no doubt a very singular case; and I think I do not recollect ever having heard such an argument, as has almost necessarily arisen here, on a question arising out of exceptions to the Master's report on the insufficiency of an answer. [His Lordship stated the case.]

The bill is framed in a manner which to me I confess is perfectly novel; I never saw a bill framed like this that I recollect. The relief which is sought by the bill, is to have the property protected pending the litigation, and a discovery is sought of many facts. Almost all bills ask for discovery; but the great singularity of this bill is, that it asks a discovery of facts, not only such facts as are material to the relief which is prayed by the bill, but also a discovery of very many facts which are not in the least degree material to that relief. Very soon after the bill was filed, a motion was made to me for the appointment of a receiver. One of the objections made to that motion was, the frame of this bill. I have a perfect recollection of it, that this bill was so much a bill of discovery, that it was hardly fit or proper for this Court to treat it as a bill for relief. That was one of the objections I had to consider, though there were several others. On considering that objection, I thought, and I believe expressed myself, that the bill was improperly framed as a bill for relief; but, that notwithstanding the prayer for a discovery, the title to the relief appeared to me to be clear, and I therefore granted the receiver: and I have a right to consider that decision as just, because it was confirmed by the Lord Chancellor, on an appeal to him. After this the parties put in answers; and it is perfectly clear, and it is admitted by all parties, that the answers which have been put in, do not fully answer all the interrogatories; and it is also admitted, that the answers which have been put in, are answers to some part of the discovery, which by the defendants themselves is considered to be quite immaterial, and irrelevant to the relief which is sought. They say they have thought it right—and no one can very well dispute the moral propriety of what they have done—they thought it right to answer such parts of the matter immaterial to the relief, as contained imputations on their character; and there they stop, and then say they intend to go no further. Exceptions were filed to the answers. The Master has overruled those exceptions, and now it comes before me.

Now, considering this bill in the way I do consider it, and that it is quite improperly framed for the purpose of relief here,

the question really is, whether the plaintiff, under the circumstances of this case, is, by the impropriety of his bill, to obtain a discovery which he could not legitimately have had on a bill for relief such as this is. That I apprehend really is the first question; and the next question is, whether the Court is to be so entangled by technicalities and form, as not to do that which the real justice and merits of the case might require. It is now avowed, though it is not stated in the bill—when I say avowed, it is most properly stated—what is the object in view. What is stated by the bill is, that a discovery of the several matters stated by the bill, is material and necessary to the plaintiff. Now, the object stated is, that it is—with regard to the proceedings which are taking place in the court of appeal from the Ecclesiastical Court—that it is most material to bring forward facts, which, if known, would be taken into consideration by the Judicial Committee, and must have a material effect on their decision. In the first place I have to observe, that in my opinion a plaintiff has no right to mix up two such distinct matters in one suit. He has no right to say, I will maintain a bill for specific relief, and add to that a bill for discovery, on a matter which is quite distinct from that specific relief. That, I think, he has no right to do.

In the next place, it is a matter of serious consideration, whether this Court has jurisdiction to entertain such a bill of discovery, if this had been a bill of discovery, in the present state of things. No doubt the Judicial Committee of the Privy Council has, by the act of parliament under which it is created, a right to ask for and claim new matter and new information, in respect of the subject on which it is to adjudicate. It may do so if it thinks fit; and, however strange that seems to our notions of the functions of a court of appeal—that it may have the means of constituting a new case on which it is to adjudicate, and on which adjudication there is no appeal whatever—however strange it may seem, there is that authority to call for fresh facts, to direct issues, and to have inquiries. But has it ever been supposed, is there anybody who has ever imagined, that an appellant in the Privy Council has a right, without any previous order or adjudication of that Court,

to adduce fresh evidence which that Court might consider? If there is to be fresh evidence gone into, and if there is to be new inquiry, is not the necessity for it to be first declared by the Court itself; and until the Court itself thinks fit to direct, and the Court thinks fit to give leave, and demands further evidence, can any party say he has a right to produce such evidence, and that the Court, when it is produced, must receive it? I apprehend there is nothing of that kind. It has been observed, and I believe with perfect truth, that no Judge who ever sat in that court on an appeal, ever yet thought it a proper exercise of his discretion to call for such new evidence; and no instance has occurred where any further evidence has been produced; and certainly it does appear to me, that the party, without leave, without a previous adjudication, or without a previous order of the Court, has no right to say, that fresh evidence shall at his demand be produced. Therefore to ask for discovery on a bill of this nature, to make out a case of this nature before the Judicial Committee of the Privy Council, when no leave has been given to adduce fresh evidence, is a different case from what it would have been, if, on the consideration of such evidence as was before it, the Judicial Committee had determined it was necessary for the justice of the case to produce fresh evidence. If an order of the Privy Council had been made, I must own I should a long time have hesitated, before I came to the conclusion, that this Court has a proper jurisdiction to act in aid of such an adjudication,—of affording discovery, if discovery was to be had, on that prayer. It is not necessary to come to any conclusion on that question, on the one side or the other. But I cannot help saying, as at present advised, that a party desiring to produce evidence, but having no order of the Judicial Committee for that purpose, has not a right in this court to file a bill of discovery for that evidence on a mere speculation. For anything that appears to the contrary, the Judicial Committee may be perfectly satisfied with the evidence adduced in the court below, and may think fit to decide on that evidence, notwithstanding that there was a bill of discovery filed and answered in this court.

I say it is not necessary to decide on these points, because I have to look at the particular nature of this case, and see how it is stated on a bill such as this is.

The party having submitted to answer, and having in part answered, I confess that is the only difficulty I have had in the consideration of this case, from the first opening of it; and then it comes to what I have alluded to before, is the Court, when it sees that the discovery ought not, under the circumstances stated, to be afforded—when it is apparent that the subject of discovery is wholly and altogether immaterial to the relief sought by the bill—is the Court to be so bound by technicalities as that, because the party has answered at all, he must be held bound to answer completely? That is a question which I admit has created some difficulty in my mind. I do not pronounce my opinion on it without some hesitation; but I am of opinion I ought not to compel the party to answer completely, because he has answered as far as he has. And being of that opinion, and that the discovery thereby sought is wholly immaterial and irrelevant to any purposes that can be answered in this court, and that this bill cannot be sustained as an independent bill for discovery in aid of the proceedings in the Judicial Committee, I think, under these circumstances, I ought to overrule the exceptions which are made to the Master's report.

M.R. }
March 4. } MOUSLEY v. CARR.

Practice.—Trustees—Interest—Costs.

The executrix of a will, under which she was entitled for life to the income of the residuary estate, omitted to invest a portion of what was afterwards declared to be part of her testator's assets, on the supposition that she was absolutely entitled to it. In a suit by the residuary legatees after her decease, her estate was, under the circumstances, only charged with 4l. per cent. upon the balance due from her estate, from the time of the death to the payment of the balance into court.

This was a suit instituted for the purpose of administering the estate of Thomas Hardcastle, who died in July 1789. He

made his will shortly before his death, and thereby gave the income of all his residuary estate to his wife, for life, and after her decease the residue was to be divided equally, between his nephew John Hardcastle, and his niece Elizabeth Haynes. And the testator directed that a trade, in which he was interested in partnership with other persons, should be carried on by his personal representative, for the benefit of his wife, during her life, and then for the benefit of his residuary legatees.

The testator's widow acted as his executrix, and died in December 1826.

This suit was instituted some time afterwards, and the representatives of the residuary legatees sought to charge the estate of the testator's widow with some profits arising from the trade, which she had applied for her own use; and also to charge her with other sums of money, for which it was contended by her representatives that her estate was not liable. The will was obscurely expressed, and the widow had obtained a decision of the Master of the Rolls in her favour; but, upon appeal to the Lord Chancellor, that decision was reversed. The balance which was ultimately found due from her estate, was paid into court, partly in January 1836, and the remainder in August 1840.

The cause now came on for further directions; and it was contended on behalf of the representatives of the residuary legatees, that they were entitled to have the benefit of such sum as might have been purchased, if the proper investments had been made by the widow, at the times at which they ought to have been respectively made; or, if not, then that they were entitled to have interest at 5l. per cent. from the time of Mrs. Hardcastle's death, till the balance which was ultimately found due had been actually paid into court; and they also contended, that the estate of Mrs. Hardcastle ought to bear the costs of the suit.

Mr. Bethell and Mr. L. Wigram appeared for the plaintiff, and—

Mr. Pemberton and Mr. Lloyd, for the representative of Mrs. Hardcastle.

Franklin v. Friih, 3 Bro. C.C. 433.

Bick v. Motly, 2 Myl. & K. 312; s. c.

4 Law J. Rep. (n.s.) Chanc. 63—were cited.

The MASTER OF THE ROLLS said, that there was quite sufficient doubt about the construction of the will to induce the testator's widow to believe that she was right in acting as she had acted; and, under the circumstances of the case, he should only charge her estate with interest at 4l. per cent., upon the balance which was found due from her, from the time of her death up to the time when the balance was paid into court, and should give no costs to either side.

L.C. }
March 31. } STRICKLAND v. STRICKLAND.

Practice.—Commission—New Orders.

Where a plaintiff files a replication, but does not serve the subpoena to rejoin, or serve an order for a commission to examine witnesses, until after the expiration of three weeks from the date of the replication, the Court will not order the bill to be dismissed.

Semble—The defendant ought to discharge the order obtained for the issuing of the commission for the examination of witnesses.

In this case, the replication was filed on the 27th of January 1841, the subpoena to rejoin was served on the 20th of February, an order for a commission to examine witnesses was obtained by the plaintiff on the 20th of February, and served on the 23rd of February. On the 1st of March, notice of motion was given for the 8th of March, by the defendant to the plaintiff, to dismiss the bill for want of prosecution, which the Master of the Rolls refused, without costs.

This was an appeal from the decision of the Master of the Rolls.

Mr. Wigram, Mr. Wakefield, and Mr. Shadwell, in support of the appeal.—The order for a commission having been served at a distance of twenty-seven days from the filing of the replication, cannot, according to the 17th order of 1831, be considered a proceeding in the cause: the "special order to the contrary," spoken of in the 17th of the new orders of 1831, means a special case to the contrary: the present case comes within the rule where no commission is required by the plaintiff; and the court below ought to have granted

the order sought by the defendant's notice of motion.

The following cases were cited in support of the motion:—

Fernes v. Hutchinson, 1 Russ. & Myl. 22.

Walmsley v. Froude, *ibid.* 334.

Williams v. Janaway, 6 Sim. 77.

Crooke v. Trery, 3 Myl. & Cr. 168.

Smith v. Oliver, *ibid.* 165.

Anon. 5 Sim. 497; s. c. *nom. Ward v.*

Smith, 3 Law J. Rep. (N.S.) Chanc. 240.

White v. Smith, 1 Keen, 381; s. c. 6 Law J. Rep. (N.S.) Chanc. 33.

Rayson v. Lees, 1 Keen, 14; s. c. 5 Law J. Rep. (N.S.) Chanc. 202.

The LORD CHANCELLOR observed, that the case of *White v. Smith* was in accordance with his views of the practice; and in the case before him, all that appeared was, that in some particulars the plaintiff did not comply with the 17th of the new orders of 1831, and no part of that order said, that in every case of non-compliance you must dismiss the bill. His Lordship added, that the defendant might dispose of the irregularity by discharging the order for the commission, but he could not acquiesce in the order obtained by the plaintiff, and complain of it at the same time.

Motion refused.

L.C. }
March 26, 31. } JEW v. WOOD.

Interpleader — Attornment — Devisees — Heirs-at-Law.

A, after the death of his landlord *B*, at the request of *C*, and others claiming to be co-devisees of *B*'s estates, under an alleged will of *B*, signed an account in writing, admitting the amount of rent due from *A*. to *B*, or his estate. *A*. shortly afterwards, on the representation of *C*. and others, the co-devisees, that they were entitled to the whole of *B*'s estates under such will, paid rent and attorned to them, believing such representation to be true:—Held, that *A*. (against whose goods and chattels process of distress had been issued by the devisees claiming under

an alleged will of B, and against whom proceedings were threatened by the co-heirs-at-law of B, to compel payment to them of the rent which had accrued due from him in respect of the premises in his occupation,) was entitled to file a bill of interpleader against the two parties.

The bill in this case was filed on the 9th of March 1841, by Thomas Jew, against Sir Matthew Wood, bart., and certain other persons named therein, claiming as devisees of the real estates of James Wood, deceased, and against other persons claiming as heirs-at-law of the same person.

It appeared, that in February 1831, James Wood demised a messuage and premises, part of his real estate situate at Gloucester, to the plaintiff, from the 25th of March 1831, at the yearly rent of 28*l.*, and the plaintiff had ever since been in possession as the tenant thereof, from year to year, at that rent. James Wood died on the 20th of April 1836, and thereupon the defendant Wood, and the other defendants claiming under the will of J. Wood, alleged, that by that will they had become seised of the reversion and inheritance of the demised premises, expectant on the determination of the plaintiff's interest therein, and that they were entitled to the rent to accrue due from the plaintiff for the same, from the time of the death of J. Wood. After J. Wood's decease, and in May 1836, the plaintiff signed an account and acknowledgment in writing, of the amount of rent due from him to the defendant Wood, and his co-defendants, the devisees under the will of J. Wood, deceased, of the premises in the plaintiff's occupation. The plaintiff, in the same month of May 1836, was requested by the defendant Wood, and his co-devisees, to attend a meeting of persons who were tenants of J. Wood at the time of his decease, and the plaintiff accordingly attended such meeting, whereat the defendant Wood and his co-devisees, and most of the tenants of the said J. Wood, deceased, were present, when the defendant and his co-devisees represented to the parties assembled at such meeting, that they were entitled to the real estates of the said J. Wood under his will. The plaintiff believed such representation to be true, and was induced,

at, or immediately after the meeting, by the defendant Wood, and his co-devisees, to pay them the rent due in respect of the premises in his occupation; the plaintiff then believing that those persons were, by virtue of the will of J. Wood, seised in fee of the reversion and inheritance of the premises then in the plaintiff's occupation, expectant on the determination of his interest therein. On the 20th of February 1839, the Judge of the Prerogative Court of the Archbishop of Canterbury delivered judgment in a cause depending in that court, in which the validity of the will of J. Wood, deceased, so far as the same related to his personal estate, came in question; and he refused probate of the first part of the will, which was written on a separate paper from the residue of the will, though referred to by the other testamentary paper. In March 1839, the solicitors for such of the several defendants as claimed to be the co-heirs-at-law of J. Wood, served a notice in writing on the plaintiff, stating that the plaintiff's payment of rent to any other persons than the co-heirs-at-law of J. Wood, or their authorized agents, would not be considered a discharge for the sum. On the 13th of August 1839, the agent of the defendant Wood and the other devisees, sent a letter to the plaintiff, requiring him to pay to such agent the rent then due from the plaintiff, in respect of the premises in his occupation.

The last payment by the plaintiff for rent, was made to the agent of the devisees on the 3rd of February 1838, in respect of rent accruing due on the 29th of September 1837. On the 15th of June 1840, the defendant Wood levied a distress on the plaintiff's goods being on and about the demised premises for the sum of 17*l.* 10*s.*, the amount of rent due for the same on the 25th of March 1840, and the plaintiff afterwards duly replevied the goods, and on the 3rd of February 1841 issue was joined in the pleas in the said suit, and notice of trial was afterwards served therein.

The bill prayed, that the defendants might interplead together, and that the plaintiff might be at liberty to pay the amount of rent then due from him, and what might afterwards accrue due from him, into court; that on such payment being made, the defendant Wood might be

restrained from proceeding further in the action of replevin; and the bill further prayed, that all the other defendants might be restrained from levying any distresses, and from commencing an action to compel payment of the rent then due, or thereafter to accrue due.

The answer of the defendant Wood, which was filed early in March 1841, and was the only answer put in to the bill, stated, that Messrs. Whitcombe and Helps as the attorneys and agents of the alleged co-heirs-at-law, in certain actions of ejectment brought by them against the defendant Wood, and the other devisees, for recovery of parts of the real estates of J. Wood, deceased, were privy to, and assisting in the filing of the present bill, and in the proceedings in this suit. On the 15th of March 1841, a motion was made before his Lordship, the Master of the Rolls, on behalf of the defendant Wood, for the dissolution of an injunction which had been previously granted by his Lordship, restraining the defendant Wood from further proceedings in the action of replevin.

On behalf of the defendant Wood, it was urged, that the case was one of collusion between the plaintiff and the co-heirs of the deceased J. Wood; that the tenant had attorned to the devisees under the will of J. Wood, and had a case to make at law distinct from that of title; that the plaintiff ought to have come to the Court immediately after the distress was made; that the devisees and the co-heirs were not claiming the same debt, inasmuch as the former claimed the rent under the attornment of the plaintiff, whilst the latter claimed it in respect of use and occupation; and it was insisted that the attornment by the plaintiff was an acknowledgment of the title of the defendant Wood, and his co-devisees.

On behalf of the defendant, the following cases were cited before the Master of the Rolls:—

Clarke v. Byne, 13 Ves. 383, b.

Dungeo v. Angove, 2 Ves. jun. 304.

Smith v. Target, 2 Anstr. 529.

Johnson v. Atkinson, 3 Anstr. 799.

Crawshay v. Thornton, 2 Myl. & Cr. 1;

s. c. 4 Law J. Rep. (n.s.) Chanc. 177.

Pomis v. Smith, 5 B. & Ald. 850.

On behalf of the plaintiff, the cases of—
Rogers v. Pitcher, 6 Taunt. 202.

Gregory v. Doidge, 3 Bing. 474; s. c.
4 Law J. Rep. C.P. 159—

were cited.

On the 19th of March, the Master of the Rolls delivered the following judgment:—

THE MASTER OF THE ROLLS.—In this case the plaintiff is tenant from year to year of a portion of the real estate of the late James Wood: his tenancy began in the year 1831, the landlord died in April 1836, leaving a will, the validity of which is now in dispute, so that it is not now known whether he died testate or intestate; and the rent which is due from the plaintiff, and which he admits to be due, is now claimed both by the devisees under the alleged will, and by the co-heirs under the alleged intestacy. The devisees have levied distresses, and the co-heirs have appeared and declared their intention to hold the plaintiff answerable to them; and the rent reserved by the lease of J. Wood, being in demand by both parties, and the rent of the land in which the plaintiff has no interest, being the only subject of contention, the case is a proper case for interpleader, unless there be some special circumstances to make it otherwise; and the plaintiff is entitled to the relief he prays, if he be not precluded by some act or omission of his own. It has been argued, that the plaintiff is not entitled to relief, because of his delay in filing the bill after he had received notice of the conflicting claims, and because of his attempting to defend himself at law, and still more because of his alleged collusion with the defendants, the co-heirs, to whose purposes it was argued he had lent himself in this proceeding. It does not appear to me there has been any improper delay; and though I had some hesitation at first, I think the defence set up at law ought not to preclude the plaintiff from relief in this court. I have felt more difficulty as to the supposed connexion between the plaintiff and the co-heirs. It seems that the expediency of instituting this suit was suggested to the plaintiff by the solicitor of Mr. Wilkins, the tenant of another portion of the land in dispute between the devisees and the co-heirs of J. Wood, who had filed

a bill for the like purpose, and had obtained an injunction, and the solicitor for Mr. Wilkins being the attorney of the co-heirs, an action of ejectment was brought by them to recover the land in question; and the effect of the bill of interpleader being, if successful, such as to answer an alleged purpose of the co-heirs, it is said some connexion at least, if not collusion, must necessarily be inferred from the conduct which was pursued. The devisees naturally desired to avoid anything that may bear the appearance of their being turned out of possession, and it is their avowed object to procure as speedily as possible an examination, in open court, of the witnesses who are to prove, as they suppose, the validity of the will; and not being able to force on a trial of ejectment, in which they do not deny the title could be better proved, they insist on their right, and allege it to be an important object to them, to proceed on their avowry in the action of replevin, and they impute to the co-heirs a desire to turn them out of possession, and to postpone the examination of the witnesses in open court, till some proceedings elsewhere have been brought to a conclusion, and they allege the plaintiff in this cause is assisting in that object.

The co-heirs do not deny their intention to postpone the trial of the ejectment, but they assign a totally different motive; and if it be true that their only motive is such as is alleged, the motive does not appear to me to be unreasonable. On these points I have no means of forming any opinion; the circumstances are such as of themselves rather lead to a conjecture that the plaintiff may be about to aid the purposes of the co-heirs, but I think that the affidavits are such as to make it impossible for me to come to that conclusion; the continuance of the injunction therefore depends on whether this is a proper case for interpleader. The special circumstances relied on, are those which tend to shew, that after the death of J. Wood, the plaintiff had formed and commenced a new holding under the devisees; and however doubtful it may be, whether under the circumstances a new holding commenced or not, that it is a question raised in a case subsisting between the plaintiff and the devisees, and independently of the question of title sub-

sisting between the devisees and the co-heirs, and to be determined on the plaintiff's behalf, by the establishment of a case for himself against the devisees; and the mere existence of such a question is argued in truth to preclude the plaintiff from his right to bring the bill of interpleader. I cannot however think, that the mere suggestion of a question between the plaintiff and one set of defendants to a bill of interpleader, is a sufficient bar to any relief being given by the bill. It is evident, in this case, the question of title between the devisees and the co-heirs is the whole substantial, if not the only existing question between the parties; the answer, though it states the transactions, said to amount to an attornment, does not insist on them as affording a distinct subject of claim. In argument, indeed, the point has been strenuously brought forward; but, under such circumstances, I consider it to be my duty to look at the facts out of which the question arises, for the purpose of seeing and considering whether there is such a question to be tried, as to preclude the plaintiff from seeking the relief he now asks for. In the case of *Clarke v. Byne*, an attornment was relied on as disentitling the plaintiff to maintain a bill of interpleader, but the demurrer in that case was overruled; and being of opinion that the attornment in this case (if such it was,) could not give to the devisees against the plaintiff any claim or title, independently of that which they claim as devisees, it does not appear to me there is in fact any question to be tried, but that of the title between the devisees and the co-heirs; and considering this to be a proper case for interpleader, I must refuse to discharge the order for the injunction.

The defendant Wood appealed from the decision of the Master of the Rolls.

Mr. G. Turner and Mr. Walker, in support of the appeal, contended, that there had been no deception or fraud practised on the part of the defendant Wood, in obtaining the attornment of the plaintiff: that the circumstances of the case of *Crawshaw v. Thornton* applied very generally to the present case: that the delay of the plaintiff in filing this bill, ought not to induce the Court to assist him; the defendant Wood

having levied the distress on the plaintiff's goods as long since as the month of June 1840, and prosecuted the same with due diligence on his part, that a case of collusion between the plaintiff and the co-heirs-at-law was made out in the defendant Wood's answer: that in the cases of *Rogers v. Pitcher* and *Gregory v. Doidge*, there was either misrepresentation or concealment of facts: that the Master of the Rolls, in the court below, did not profess to give any opinion on the cases already mentioned, but appeared to be strongly impressed with the case of *Clarke v. Byne*.

Mr. Wigram and Mr. C. C. Barber, for the respondent, contended, that the case before the Court was clearly one of interpleader, according to the doctrine laid down in *Crawshay v. Thornton*, a case which was not disputed: that no rent had been paid by the plaintiff since so far back as the month of September 1837: that it was the appellant in reality, and not the respondent, who had been guilty of laches; and that the case of *Rogers v. Pitcher* was directly in point, and in favour of the respondent, the tenant in that case having been ignorant, when he paid his rent, of certain material facts.

The LORD CHANCELLOR, after shortly stating the facts, proceeded as follows:—An important question exists between the co-defendants, viz. whether there has been a good testamentary disposition of the property in the occupation of the plaintiff by James Wood; and the case before me would be clearly one of interpleader, if the particular circumstances and dealings alleged as having taken place between the plaintiff and the devisees had not occurred. [Here his Lordship read the passage in the answer, admitting the payment of rent by the plaintiff, under the belief that the representation made by the defendant Wood, that he and the other persons named by him at the meeting, were the devisees of the real estates of J. Wood, was true.] The plaintiff says, he paid his rent to the defendants Wood, Osborn, Surman, and Chadborn (since deceased), for a certain length of time, but afterwards declined to pay any further rent to those persons, having received notice from the co-heirs-at-law of J. Wood, that if he made any further payments on account of rent to

any persons, other than themselves, he would be held liable to pay the same over again. These are the circumstances that raise the question, whether this is a case of interpleader. Proceedings by way of distress are then commenced by the defendant Wood, to obtain payment of the rent alleged to be due to him, and on application to the Master of the Rolls, on behalf of the plaintiff, an injunction is granted against any further proceeding in the process of distress, on the plaintiff paying into court the amount of rent due from him. No question arises here as to the doctrine laid down in *Crawshay v. Thornton*, and the present case widely differs from that case in its circumstances.

The question is, whether the facts stated in the answer shew, that there is a substantial case to be tried between the plaintiff and the devisees claiming under the alleged will of J. Wood. Several cases were cited on the part of the defendant Wood, during the arguments, for the purpose of shewing that what had taken place between the plaintiff and the devisees under the alleged will, precluded the plaintiff from disputing their title to the rent due from the plaintiff; but I have examined the cases, and I find it clearly established at law, that after the death of his landlord, a tenant may dispute the title of the party claiming the property occupied by him, although such tenant may have actually paid rent to the claimant. The case of *Rogers v. Pitcher* was one, where rent had been paid by a tenant in ignorance of certain material facts; and the payment by the tenant was held not to alter his situation. In *Fenner v. Duplock* (1), it was held, that the payment of rent by the lessee to his lessor, after the lessor's title had expired, did not amount to a virtual attornment, unless at the time of payment the lessee knew, not only of the adverse claim, but the precise nature of it. *Gregory v. Doidge* was a still stronger case; there was no misrepresentation; the tenant had deliberately acknowledged the party claiming to be his landlord, had made an agreement with respect to the rent upon that footing; but this, having been proved to have been done in ignorance

(1) 2 Bing. 10; s.c. 2 Law J. Rep. C.P. 102.

of the title of the other claimant, was held not to bind the tenant.

The case of *Hopcraft v. Keys* (2) has no direct application, that decision having proceeded upon this—that the occupier did not hold under the party who claimed the rent, that party having been evicted by a title paramount, and the occupier having commenced a new tenancy under the party who so evicted his prior landlord. The case of *Doe d. Plevin v. Brown* (3) was a case of attornment made by the direction of the person under whom the tenant held. The title was disputed by his assignee, and Lord Denman, in holding that the tenant was at liberty to dispute the title of the person to whom he had attorned, stated, that it was competent for him “to explain and render inconclusive, acts done under mistake, or through misrepresentation;” placing therefore, mistake and misrepresentation, for that purpose, upon the same footing.

So far, I think, it was admitted at the bar, that the cases were uniform. But *Hall v. Butler* (4), which was referred to, it is contended, establishes a different doctrine. Now, I think, the doctrine of that case is by no means inconsistent with the former cases, but completely and entirely consistent therewith. In that case the tenant took possession, and held under a person named Nevitt, who afterwards directed the tenant to pay his rent for the future to the defendant Butler. Another person then claimed by title paramount to Nevitt. Butler, the defendant, was entitled to stand in Nevitt's place, and the tenant, who could not dispute Nevitt's title, was held to be equally precluded from disputing Butler's. The Judges put it upon this ground,—either that the defendant Butler ratified the demise, or that there was a fresh demise by him; and that in either case the tenant could not dispute Butler's title. Now, it will be observed, that in either case the tenant was disputing the title of the person from whom he derived his tenancy, and not the title of a party claiming through such person. There is

nothing, therefore, at all inconsistent in the doctrine of that case with the doctrine of all the preceding cases. Upon this review of the cases at law, there appears to me to be no doubt, but that the plaintiff, notwithstanding what has passed between him and the defendant Sir M. Wood, is entitled to shew if he can, that Sir M. Wood is not a devisee of the original lessor, and therefore not entitled to the tenant's rent. There is no question between the plaintiff and any of the defendants, except that which is in dispute between the different defendants, and the case before me is, therefore, a proper case for interpleader.

Motion refused, with costs.

M.R. }
Mar. 19, 21, 26. } ELLIS V. MAXWELL.

Will—Construction—Maintenance and Education—Act of Parliament, 39 & 40 Geo. 3. c. 90—Accumulation—Minority—Vested Interests.

A testator, by his will, devised freehold estates in fee to trustees, upon trust, out of the rents, and if they should prove insufficient, then out of his personal estate, to pay two annuities to his son and wife respectively; and to invest and accumulate the residue of the rents, so that the same might become part of his personal estate. Subject to the charge, he directed his trustees to stand seised of the same estates, to the use of the first and other sons of his son J. M., in tail male, with remainder to his daughter A. L., for life, with remainder to trustees, to preserve, &c., with remainder to the first and other sons of his said daughter, in tail male, with remainders to the daughters of his son and daughter, as tenants in common, in tail, with remainders over; and he directed that no persons should, under the limitations and trusts aforesaid, become entitled to the lands in possession, and the rents and profits thereof, during such time as any antecedent limitation remained in contingency. He then disposed of leasehold estates, and gave his personal estate to his trustees and executors, for the benefit of all the sons and daughters of his son and daughter, except the eldest son, or such other son as by the

(2) 9 Bing. 613.

(3) 7 Ad. & El. 447; s. c. 8 Law J. Rep. (N.S.) Q.B. 49.

(4) 10 Ad. & El. 204; s. c. 8 Law J. Rep. (N.S.) Q.B. 239.

death of an elder brother, might become an eldest son, whether such eldest son was the son of J. M. or of A. L., but a son of J. M. was to be preferred; and he directed the trustees to transfer the trust fund unto all his younger grandchildren equally to be divided between them, as and when being sons they should attain the age of twenty-one, or being daughters should attain that age, or become previously married; but, in the meantime, his will was, that though the parents of his grandchildren, or either of them, should be living, it should be lawful for the trustees to apply the interest of each grandchild's presumptive share, even including an eldest son's share, in the maintenance and education of all his grandchildren, and the surplus, if any, was to be laid out to accumulate, and be payable along with their respective original shares, when the same became vested and transmissible. The will then provided for giving to surviving grandchildren the benefit of accruing shares of any who should die without having acquired a vested interest; and he then expressed his will to be, that from and after the decease of J. M. and A. L., as well as during the lives of both or one of them, his trustees should, until the share or shares of all his grandchildren, of and in the trust funds, should become vested and assignable, transferable or payable, pay and apply the dividends, &c. of the trust funds, in the maintenance and education of every such child or children respectively, including even the eldest, as they should think fit; and he directed that anything not sufficiently disposed of, should go to his wife, as his residuary legatee.

The testator died on the 8th of September 1818, leaving his son a lunatic and unmarried. The daughter, A. L., had no children born at testator's death, but had since had four children, the eldest, H. W. M. L., born 29th of September 1818, who attained age on the 29th of September 1839, and the youngest born on the 10th of January 1838: the term of twenty-one years expired on the 8th of September 1839, three weeks before H. W. M. L. attained twenty-one.—Held, that H. W. M. L., the eldest son of A. L., though not entitled to a vested interest in a share of the personal estate, was entitled to an allowance out of the trust funds for his maintenance, although he had attained the age of twenty-one years.

The act of parliament, 39 & 40 Geo. 3. c. 98, does not permit accumulation during the minority, and also a time to elapse between the death of a testator and the commencement of the minority.

Held also, that the trust for accumulation after H. W. M. L. attained twenty-one, was void, and that the surplus of the annual produce went to the residuary legatee, and that the younger children of A. L. took vested interests in the trust funds, subject to be partially divested by the birth of after-born children.

In this case, the testator, William Maxwell, by his will, dated the 25th of March 1818, devised his freehold estates to his wife, the defendant, Jane Maxwell, and to the plaintiffs, in fee, to the intent that his wife might receive an annuity of 1,000*l.* for her life, out of the rents, if sufficient; but if not, then out of his personal estate; and to the further intent that his son John might receive and have applied to his benefit, an annuity of 1,000*l.*, which might be increased, under the circumstances in the will mentioned; and he directed the residue of the rents so charged to be invested and accumulated, to the intent that the same might become part of his personal estate; and, subject to the charge, he directed his trustees to stand seised of his freehold estate, to the use of the first son of the body of his son John, in tail male, with remainder to the other sons successively of his son John, in tail male, with remainder to his daughter Ann Lyte, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first son of the body of Ann Lyte, in tail male, with remainder to the other sons successively of his daughter Ann Lyte, in tail male, with remainders to the daughters of his son John and his daughter Ann Lyte, as tenants in common in tail, with other remainders over; and he directed that no person should, under the limitations and trusts aforesaid, become entitled to the lands in possession, or to the rents and profits thereof during such time as any antecedent limitation remained in contingency. He then disposed of his leasehold estate, and gave his personal estate to his trustees and executors, desiring them to pay his debts and certain legacies, and

directed, that after payment of his debts and legacies, his trustees should stand possessed of his personal estate, on the trusts after mentioned, for the benefit of all the sons and daughters of his son John Maxwell and his daughter Ann Lyte, except the first born or eldest son, or such other son as by the death of an elder brother, might become an eldest son, and who as such should become entitled to a considerable portion of his fortune under the limitations of his will, whether such eldest son was the son of John Maxwell or of Ann Lyte, but a son of John Maxwell was to be preferred; and to that end he directed the trustees to transfer the trust funds unto all his younger grandchildren equally, to be divided between them as and when being sons they should attain the age of twenty-one, or being daughters, should attain that age, or become previously married; it being his intention that each of such shares should become vested at that age, or previous marriage, if daughters, though such shares should not become payable or transferable till after the demise of both his son and daughter; and he directed, that if he should have only one grandchild, who should live to gain such a vested interest, the whole fund should go to such one grandchild; but, in the meantime, his will was, that though the parents of his grandchildren, or either of them, should be living, it should be lawful for the trustees to apply the interest of each grandchild's presumptive share, even including an eldest son's share, or such portion thereof as they might think fit, in the maintenance and education of all his grandchildren, or in the aid thereof, and the surplus, if any, was to be laid out to accumulate, and be payable and paid along with their respective original shares, when the same became vested and transmissible, together with all such benefit of survivorship, among his younger grandchildren, as after mentioned; and such payments were to be allowed to the trustees in their accounts, though such grandchildren should not live to attain a vested interest under his will. It then provided for giving to surviving grandchildren the benefit of the accruing shares of any who should die without having acquired a vested interest; and he then expressed his will to be, that

from and after the decease of his son John Maxwell and his daughter Ann Lyte, as well as during the lives of both or one of them, his trustees should, in the meantime, and until the share or shares of all his grandchildren, of and in the trust funds, should become vested and assignable, transferable or payable to him, her, or them respectively, pay, apply, and dispose of the dividends, interest, and annual proceeds of the trust funds in and towards the maintenance and education of every such child or children respectively, including even the eldest, in such manner as the trustees should, in their discretion, think fit. He afterwards directed, that if there should be anything he might not have sufficiently disposed of, the same should go and belong to his wife Jane Maxwell, as his residuary legatee.

At the date of the will, and at the time of the testator's death, which happened on the 8th of September 1818, the testator's son John Maxwell, was and still remained a lunatic and unmarried. The daughter, Ann Lyte, had no children born at the time of the testator's death, but she had since had four children; the eldest was born on the 29th of September 1818, and attained his age of twenty-one years on the 29th of September 1839; the youngest was born on the 10th of January 1828. The term of twenty-one years after the testator's death expired on the 8th of September 1839, three weeks before the eldest son of Ann Lyte attained the age of twenty-one years.

The will was very inaccurately expressed; it was, in some respects, contradictory, and several questions were raised on its construction.

Mr. Lewin, for the defendant, the widow of the testator, who was also his residuary legatee, contended, that the bequest of the residuary estate amounted, in effect, to a trust for accumulation during the lives of the testator's son and daughter, and the survivor of them; and that it was void for the excess above twenty-one years, and that she was entitled to the income, which could not lawfully be accumulated. It was further contended for her, that the trustees had no power to apply any part of the income towards the maintenance of

any grandchildren who had attained the age of twenty-one years.

Mr. Kindersley, on behalf of the defendant Henry William Maxwell Lyte, the eldest son of the defendant Ann Lyte, and who had attained the age of twenty-one years, contended, that though the defendant H. W. M. Lyte was then the eldest son, yet, as he might be excluded from all benefit of the limitations of the real estate, by the birth of a son of John Maxwell, and was, during that contingency, and the life of his father, excluded from any interest in possession of the land, he ought at present to be considered as a younger grandchild, and as such to acquire a vested interest in a share of the personal estate, and therefore he claimed to have such share or interest paid to him, or at least to have his right thereto declared. It was further contended on his behalf, that if he should not succeed in establishing that claim, he had, as eldest grandson, a right to have an allowance for his maintenance and education, till the shares of the younger grandchildren became payable.

Mr. Tinney and *Mr. Morley*, for the younger grandchildren of the testator, the younger children of Ann Lyte, contended, that Henry William Maxwell Lyte being at that time the eldest grandson entitled in expectancy to the freehold estate, could not, while he held that character, be entitled to a share of the personal estate, though he might become so, if, by the birth of a son of John Maxwell, his expectancy should be further postponed; and they submitted to the Court whether H. W. M. Lyte was entitled to any allowance for maintenance out of the income, after attaining his age of twenty-one years; and it was further contended for the younger grandchildren of the testator, that the trust for the accumulation, whether express or implied, was a trust during the minority of the grandchildren, who, under the uses of the will, would, if of full age, be entitled to the income, and that such accumulation was lawful under the statute; and it was insisted, that when they attained the age of twenty-one years, they would be entitled to a vested interest, subject only to be partially divested in the event of other grandchildren coming into *esse*,

but that till such grandchildren should be born, each of the present grandchildren would, on attaining the age of twenty-one years, be entitled to receive the income arising from his or her presumptive share.

Mr. Jeremy appeared for the defendant John Maxwell.

Mr. Bethell, for the defendants Henry Francis Lyte and Ann his wife, and—

Mr. Purvis, for two of the trustees of the testator's will, by whom the bill was filed in the month of November 1839, seeking the direction of the Court, as to the execution of the trusts of the testator's will.

The following cases were cited in the course of the argument:—

O'Neill v. Lucas, 2 Keen, 313.

Macdonald v. Bryce, *ibid.* 276; s. c. 7

Law J. Rep. (n.s.) Chanc. 173, 217.

Eyre v. Marsden, *ibid.* 564; s. c. 7

Law J. Rep. (n.s.) Chanc. 194, 220.

Pride v. Fooks, 2 Bea. 430; s. c. 9 Law

J. Rep. (n.s.) Chanc. 234.

Mills v. Norris, 5 Ves. 335.

Roper on Legacies, vol. 1, p. 46, note.

Haley v. Bannister, 4 Madd. 275.

Shaw v. Rhodes, 1 Myl. & Cr. 135,

affirmed in 5 Cl. & Fin. 114.

Evans v. Hellier, 5 Cl. & Fin. 114.

THE MASTER OF THE ROLLS, after stating the will and the facts of the case, proceeded to deliver his judgment as follows:—As there is not at present any surplus of the rents of the real estate, and as none of the younger grandchildren have yet attained the age of twenty-one years, some of the questions which arise on this will, do not now require decision. The questions which it is necessary to consider are, first, whether the defendant Henry William Maxwell Lyte, the eldest grandson, for the time being, is entitled to a vested interest in a share of the personal estate: if he is not, whether he is nevertheless not entitled to an allowance for his maintenance and education, or maintenance alone, out of the income of the personal estate, notwithstanding his having attained the age of twenty-one years. The other question is, whether the trust for accumulation is void, for the time exceeding twenty-one years

from the testator's death, or for the time that may elapse after the attainment of twenty-one years, by the eldest grandson.

On the question, whether the defendant Henry William Maxwell Lyte is entitled to a vested interest in the personal estate, it appears to me by the words "save and except the first born or eldest son, who, as such, would be entitled to a considerable portion of my fortune, under the limitations of this my will," the eldest son, answering that description, is excluded from the class for whose benefit the capital of the personal estate is given, and this construction is, I think, confirmed by the mode in which the testator has taken care to provide for the maintenance of such eldest son out of the income, and by his thinking it necessary on two distinct occasions, to include the eldest son specifically as one of the grandchildren to be so maintained. It might happen, a son of John Maxwell might be born; such son would, by the express words of the will, be entitled to a prior interest in the real estate, and, in that event, the eldest son of Mrs. Lyte will, on the construction of the will, have the right of a younger grandchild to a share of the personal estate. At present, I think he is not entitled to a vested interest in the capital: I think, the intention to be collected from the will is, that the shares of the grandchildren should not be paid during the lives of John Maxwell or Ann Lyte, or the life of the survivor of them. The testator has distinctly contemplated two periods, the time of vesting, and the time of payment; but the will is expressed very inaccurately as to what is to be done on each occasion and in the meantime. In one place, he seems to direct the shares to be paid to the grandchildren, as and when they respectively attain the age of twenty-one years; but in the same clause, he says, the shares are to vest at twenty-one, but not to become payable or transmissible till after the death of both his son and daughter; and having in one place expressed himself so as to exclude an eldest son from any share whatever, he in another place speaks of an eldest son's share. On the result of the whole clauses in the will, I apprehend, that

according to the terms, the eldest son, though excluded from a vested interest in the capital, is entitled to an allowance out of the income for his maintenance and education; and then the question is, whether the trustees have authority to continue this allowance after the eldest son's attainment of twenty-one years of age; and whatever ambiguity (and there certainly is some) there may be in the first clause relating to the maintenance, I think, on the second, the trustees have such authority. The words are, "from and after the decease of both his son and daughter, as well as during the lives of both, or the life of one of them, the trustees shall, in the meantime, and until the share of all the grandchildren shall become vested and assignable, transferable or payable to him, her, or them respectively, pay, apply, and dispose of the dividends, interest, and annual proceeds of his said trust funds in and towards the maintenance and education of every such child or children, including even the eldest, in such manner as the trustees shall think fit." This clause is expressed generally, without distinctly referring to the ages of the children. The words "vested, assignable, transferable, or payable," appear to me to shew that the testator contemplated a period beyond the time when, according to the former clause, the shares were to become vested, but not payable or transferable; and on the best consideration I have been able to give to the case, I think there are no words in the will which lead necessarily to the conclusion that the operation of this clause, which itself contemplates a longer period, should be confined to the minority of the children who are to be maintained, and in the event of the majority being attained during the lives of his son and daughter.

I am, therefore, of opinion, that Henry William Maxwell Lyte is entitled to an allowance for his maintenance, notwithstanding his having attained his age of twenty-one years.

With respect to the question relating to accumulation, the words of the statute permit accumulation for the term of twenty-one years from the death of the testator, or during the minority of any person who should be living or *in ventre sa mere* at the

time of the death of the testator, or during the minority of any person who, under the uses of the will, would, for the time being, if of full age, be entitled to the annual produce directed to be accumulated. Mrs. Maxwell admits the accumulation to be good for twenty-one years, and has scarcely submitted it may not be good during the minority of Henry William Maxwell Lyte, who was *in ventre sa mere* at the time of the testator's death. She insists it can be good no longer, while the younger grandchildren insist they are the persons who will, under the uses created by the testator's will, on attaining the age of twenty-one years, be entitled to the actual produce of the whole funds. The difficulty of attributing a distinct and efficient meaning to all the words of this act, has frequently been acknowledged; and if the accumulation is permitted only during the minority of the person entitled under such uses of the will, and no time is allowed either before the minority has commenced, or after it has ceased, it does not seem any thing is added for the time during the minority of a person living at the death of the testator; but taking the words as they stand, they do not appear to permit accumulation during the minority, and also a time to elapse between the death of the testator and the commencement of the minority, or in favour of any person who would not, for the time being, if of full age, be entitled to the annual produce of the fund; and accordingly, in the case of *Longdon v. Simson* (1), where an accumulation was intended to be made until unborn children attained twenty-one, Sir William Grant decreed an accumulation for twenty-one years only; and in *Haley v. Bannister*, Sir John Leach expressed his opinion to be, that the statute did not permit accu-

(1) 12 Ves. 295.

mulations during the minority of unborn children.

Those cases prevent me from considering on the construction of the act, whether the accumulation would be lawful during the minority of any grandchildren born after the death of the testator. Moreover, on the construction of the will, it will have to be considered whether the younger children attaining twenty-one, will be entitled to the annual produce of the fund, though it may be lawful for the trustees to make them an allowance for maintenance and education out of it, after they have attained twenty-one. In the view I take of this case, it does not appear to me, that the circumstance of the younger children taking vested interests at twenty-one, makes any material difference. They will, as it seems, have vested interests, subject to be partially divested by the birth of after-born children; but in *Eyre v. Marsden*, the interest was vested on the death of the testator, subject to be divested on a particular event, and yet the grandchild was held not to be entitled till the time of distribution pointed out by the testator.

It appears to me, therefore, that the trust for accumulation after the attainment of twenty-one years by Henry William Maxwell Lyte, is void; that an allowance ought to be made out of the fund accumulated up to that time, for the maintenance and education of all the grandchildren, including Henry William Maxwell Lyte; and that the surplus, if any, of such annual produce belongs to Jane Maxwell, as residuary legatee.

There must be a reference to the Master to inquire what sum is proper to be allowed; and if there be a question about costs, that must be decided according to the decision of the Lord Chancellor in *Eyre v. Marsden*.

GENERAL ORDER.

IT IS ORDERED, that in all cases where any stocks or funds are or shall be standing in the name of the Accountant General of the court, to the general credit of any cause, or to the account of any class or classes of persons, and an order shall be made to prevent the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of any person or persons entitled in expectancy, or otherwise, to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the shares of such stocks or funds affected by such order, shall, at the discretion of the Court, be liable to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause, or any person interested in any such stocks or funds; and, henceforward, any person presenting a petition for any such order as aforesaid, shall not be required to serve such petition upon the parties to the cause, or upon the persons interested in parts of the stocks or funds not sought to be affected by any such order.

COTTENHAM, O.
LANGDALE, M.R.
LANCELOT SHADWELL, V.C.

April 3, 1841.

END OF HILARY TERM, 1841.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

EASTER TERM, 4 VICTORIÆ.

M.R. }
April 27. } HERCY v. FERRERS.

Production of Documents—Legacy—Parties.

A. filed his bill to compel payment of a legacy left him by the will of his grandfather (who died in 1795), and charged specifically on the estates of his grandfather, "not in settlement." The answer of the defendant, who was absolutely entitled to the estates in question, subject to the legacy, as well as the estates in settlement, stated, that the unsettled estates had been long since entirely exhausted by mortgages of large amount, to different persons, prior, in point of date, to the time of the death of the grandfather, and the date of his will. The answer admitted the possession by the defendant of copies of certain deeds and documents making out the title of the defendant to the settled and unsettled estates:—Held, that the defendant was bound to produce the same (with the exception of any cases and opinions of counsel), notwithstanding the absence of parties to the suit of the mortgagees of those estates.

The bill was filed by George Thomas Ferrers and John Hercy, his assignee,
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against the defendant, to compel payment of a legacy of 1,000*l.*, charged by the will of Edward Ferrers, the defendant's grandfather, dated the 25th of September 1795, in favour of the plaintiff, G. T. Ferrers, on certain estates, alleged therein not to be in settlement. There were other estates which were the subject of previous settlement. The defendant was in possession of the estates charged with the legacy. The testator was, at the date of his will, interested in the settled estates, by virtue of certain articles of settlement, dated in the year 1763, but he possessed no disposing power therein. The estates charged with the legacy of 1,000*l.* were also subject to charges by way of mortgage, prior in point of date to the will of Edward Ferrers, the grandfather, and some of those charges had been satisfied by means of monies raised out of the settled estates, to which the defendant was entitled, subject to the existing charges thereon. The answer stated, that the unsettled estates were insufficient in value to raise the prior charges created thereon; but it was admitted, by the defendant, that the unsettled estates were charged with the legacy of 1,000*l.*, claimed by the plaintiff, as well as other legacies of similar amount in favour of

2 N

other younger children; and the defendant, by his answer, set forth a list of deeds and documents formerly in his possession, but then in the possession of his mortgagees, and making out, as was alleged by the defendant, his title to the estates mentioned in the bill, and not the title of the plaintiffs, or either of them. The defendant admitted possession of copies of articles of settlement of 1763, of the will of 1795, of deeds, assignments of terms, surveys, and other documents, and of a case for and opinion of counsel, and letters, &c., relating to the matters mentioned in the bill, but which, the defendant submitted, he was not bound to produce for the plaintiffs' inspection, under the circumstances stated by the defendant in his answer.

Mr. Pemberton and *Mr. Bates* now moved, on behalf of the plaintiffs, for production of the deeds, documents, and writings, admitted by the defendant to be in his possession, and contended, that as they appeared *prima facie* to relate to the estates charged with the legacy payable to the plaintiff *G. T. Ferrers*, the defendant was bound to produce them for the plaintiffs' inspection; that if the settled and unsettled estates had been charged *en masse*, the plaintiffs had a right to have an inspection of the documents relating to those estates, in order to have those charges apportioned. *Hardman v. Ellames* (1) was cited.

Mr. Kindersley and *Mr. Romilly*.—The opinion set forth in the defendant's answer must not be produced. Not only the defendant, but his father, have already and gratuitously done more in favour of the plaintiff *G. T. Ferrers*, than they were bound to do, as appears by the answer, and the estates alleged to be liable to the charge claimed by the plaintiffs, have been long since entirely absorbed by charges thereon of prior date to the legacy in question. The bill alleges, that the grandfather, *Edward Ferrers*, who made the will of 1795, by which the legacy was given, was seised in fee simple of the *Badlesley* estate, whereas the fact, as stated by the answer, is, that he was tenant in tail only of nearly the whole of that estate, and never suffered any recovery thereof;

the plaintiffs cannot insist on seeing the documents that exclude their title, viz. those relating to the settled estates, as well as those (if any) that manifest their title. The parties to whom the unsettled estates have been mortgaged to the amount of 12,000*l.*, and whose securities are of prior date to the will, under which the plaintiffs claim, are not before the Court, and in their absence the documents and papers, in which they are so materially interested, ought not to be ordered to be produced.

The MASTER OF THE ROLLS, after stating the facts of the case, observed, that it would have to be determined of what the unsettled estate, charged with the legacy, consisted; but before that could be accomplished, the particulars must appear of the settled estate; and how could those particulars be ascertained, unless the documents and papers in question were produced for the plaintiffs' inspection? His Lordship further observed, that the absence of the mortgagees of the unsettled estates, was not a sufficient objection to induce the Court to protect the defendant against the production of the copies retained by him of the different documents and papers relating to the estates, the originals whereof were in the mortgagees' possession; and added, that probably the plaintiffs might wish to pay off the incumbrances on the unsettled estates, which were prior in date to the legacy, and on that account it was important that the plaintiffs should have the documents and papers produced for their inspection, except the case and opinion mentioned in the schedule to the defendant's answer.

L.C.
Mar. 31; April 2. } SEELEY v. FISHER.

Injunction—Action at Law—Copyright—Libel—Piracy—Damages at Law.

T. S., during his lifetime, published, in periodical numbers, and at different intervals of time, four consecutive editions of a Commentary on the Bible, the copyright whereof he disposed of to the plaintiffs. At the time of his death he had, with the assistance of a literary friend and amanuensis, in a great measure revised the fourth edition, and he had

(1) 2 Myl. & K. 732; s. c. 4 Law J. Rep. (N.S.) Chanc. 181.

made additions thereto, with the purpose of publishing a fifth edition; the plaintiffs, the owners of the copyright of the revisions and additions, published them after T. S.'s death, by the title of the fifth edition of T. S.'s Commentary on the Bible. The copyright in the early numbers of the fourth edition having expired, by effluxion of time, the defendants publicly advertised their intention to publish a new edition of T. S.'s Commentary on the Bible, to this effect: "that to prevent the possibility of misconception, the defendants' intended edition would contain the whole unadulterated labours of the author, not as re-edited and mutilated by a different hand and an inferior mind, but precisely as the amiable author bequeathed them to the world; the defendants' intended edition to be printed from the last edition published by the author in the vigour of life."

An injunction having been granted by the Court below, restraining "any advertisement or statement to the purport or effect that any edition of T. S.'s Commentary or work, published, or to be published, by the defendants, contained, or would contain, the whole of the Commentary or observations of T. S., as written by him, or bequeathed by him to the world, or the whole of the last corrections, improvements, and additions made by the said T. S. to his Commentary or work," the same was, on appeal, dissolved.

The Court does not interfere by injunction to prevent publications or libels which may be injurious to the property of others, but it deals with the subject as questions of property, and not of individual interest; and therefore, if, in the present case, the defendants had announced that their work contained that which was exclusively the property of the plaintiffs, an injunction might have been properly awarded against the defendants, although the case would also have been a proper subject for an action at law; but where the defendants had represented that their edition contained all the matter that could be safely attributed to T. S., and that any other editions of T. S.'s Commentary were not to be regarded as genuine, or as being finished by T. S., so as to be considered alterations or improvements under the authority of T. S., such representation, unless proved to be true, might be the subject of complaint, as being a libel on the

work published by the plaintiffs, but could not be the subject of injunction in a court of equity.

From the affidavits, in support of the bill, it appeared that the Rev. Thomas Scott, in his lifetime, edited and wrote a Commentary on the Bible, the first edition whereof was printed and published in parts between the year 1788 and 1792, the second edition between the years 1802 and 1809, the third edition between the years 1807 and 1811, and the fourth edition between the years 1812 and 1814. The title to the fourth edition of the work was as follows:—'The Holy Bible, containing the Old and New Testaments, according to the public Version, with Explanatory Notes, Practical Observations, and copious Marginal References, by Thomas Scott, Rector of Aston Sandford, late Chaplain to the Lock Hospital.' After completion of the fourth edition, Thomas Scott commenced revising the same, and in the course of such revision made corrections, improvements, and additions to the fourth edition. Thomas Scott died in the year 1821, not having completed the revision of the whole of his work; and in the year 1822, the plaintiffs published a fifth edition of the work, which was stated to comprise all the corrections of the author, Thomas Scott, which had been made by him whilst revising the fourth edition of the work. During such revision, Thomas Scott used a printed copy of the fourth edition, and wrote and made, with his own hand, about the margins of the printed copy, the greater part of the corrections, improvements, and additions, and the remainder thereof were written by one William Rutter Dawes, under the direction and supervision and with the sanction of Thomas Scott; and, with the exception of a few sheets of letter-press at the end of the work, the whole was in the fifth edition printed from the printed copy, so used by Thomas Scott. The following was the title to the fifth edition:—'The Holy Bible, containing the Old and New Testaments, according to the authorized Version, with Explanatory Notes, Practical Observations, and copious Marginal References, by Thomas Scott, &c. The Fifth Edition, with the Author's last Corrections and Improvements.' The

plaintiffs were the owners and proprietors of the copyright of the alleged corrections and improvements made to the fourth edition, and not comprised therein; and also of so much of the copyright of the fourth edition as had not expired by effluxion of time. The defendants carried on business as booksellers, publishers, and printers in London, under the title of "Fisher, Son, & Co.;" and on the 1st of January 1841, published the first part of a new edition of Thomas Scott's Commentary on the Bible, which they *announced and described* to the public as follows:—

"Fisher's Illustrated edition of the Rev. Thomas Scott's Bible, in monthly parts, at 2s. every part, embellished with a highly-finished engraving on steel, forming a series of views of the principal places mentioned in Scripture, from drawings taken on the spot. The extensive patronage bestowed on the inestimable Commentary of this learned and scriptural writer has induced the publishers to prepare and present a new and most carefully-revised edition of his great work; and although they have engaged the services of an eminent scholar to read the proofs during the progress of printing, they pledge themselves that no alteration or interference whatever, either in the spirit or the style of the Commentary shall take place; accuracy in typography, and verification of references, being their sole objects in incurring this additional and considerable expense. They wish also to add, that the work is printed from a beautiful and clear type entirely new, and that cast expressly for this undertaking. The invaluable character of the Commentary rendering any infringement or abbreviation mischievous, economy in bulk has been effected by the employment of a smaller type and expanded page, so that three quarto volumes may contain the whole unadulterated labours of the author, not as re-edited by a different hand and inferior mind, but precisely as the amiable and learned commentator bequeathed them to the world. This edition is printed from the last, which the author published in the vigour of life, for being well satisfied with its appreciation, he devoted the latter years of his useful existence to the formation of an Index. 'My main occupation,' said the

venerable man, 'is the index to the Bible. The publishers are so urgent for me to expedite it, that I am forced to give up or postpone my plans of revision,' &c. (*Vide Life of the Author, 1823.*)

"To prevent the possibility of misconception, the publishers state distinctly, that this edition will include, besides the authorized text of the Holy Scriptures, the commentary, notes, marginal references, and practical observations, as the author wrote them, without interpolation or omission, together with a copious index, tables of proper names, promises, &c. &c.

"Inferior, therefore, to no edition of Scott's Bible, in the fulness or genuine character of its contents, in typographical accuracy or arrangement, it still claims another advantage over rival editions, which, it is believed, will place it beyond the reach of the most enterprising competitors; this superiority consists in its being illustrated by a series of views in Judea, Syria, Asia Minor, Rhodes, Malta, Rome, &c., not the result of fiction or fancy, but true, exact, and faithful representations of the scenes so frequently alluded to in the Holy Scriptures, recently taken on the spot by eminent artists, and engraved in the best manner of the present time. Such views possess a degree of truth and reality well calculated to accompany so sincere a commentary. It is but justice to themselves, the publishers, to state, that they have been repeatedly and warmly urged to publish their scenery on the Holy Land in a separate volume as Biblical Illustrations, but that they have as perseveringly declined, from a desire to reserve them solely for the present work; a work which they confidently anticipate will soon become not merely the popular, but the standard edition of Scott's Commentary on the Holy Scriptures."

On the 15th of January 1841, the defendants caused an *advertisement* to be inserted in "The Publishers' Circular," respecting their edition of Thomas Scott's Commentary on the Bible, which was as follows:—"The only edition, with steel engravings, views of real scenes. Fisher's Illustrated edition of the Rev. Thomas Scott's Bible, in about forty monthly parts, at 2s., every part embellished with a highly-finished engraving on steel, forming

a series of views of the principal places mentioned in scripture, from drawings on the spot. Part I. now ready, containing seven sheets of letter-press, and views of Jerusalem and of Zidon. Part II. will be published on the 2nd instant, containing a view of Damascus. To prevent the possibility of misconception, the publishers state distinctly, that Fisher's edition of this standard and inestimable Commentary will include, besides the authorized text of the Holy Scriptures, the commentary, notes, marginal references, and practical observations, not as re-edited and mutilated by a different hand and an inferior mind, but as the author wrote them, printed without interpolation or omission from the last edition published by him in the vigour of life, together with a copious index, tables of proper names," &c.

The affidavits further stated, that the announcement and advertisement respecting the intended edition were calculated greatly to mislead, and did in fact mislead, the public, as to the nature and contents of the intended new edition, and that the first number of the defendants' edition, so far from containing the whole unadulterated labours of Thomas Scott, respecting that portion of the subject which was commented upon and printed in the defendants' first number, did not, in fact, contain any of the corrections or improvements in, or additions to the fourth edition; but that, with some slight exceptions, the whole of the letter-press contained in the first number of the said defendants' edition, was a transcript of the corresponding portion of the fourth edition; that the defendants had sold many copies of the first number, published by them, and made large profits thereof; that the public had been, by reason of the false representations and assurances, contained in the announcement and advertisement, induced to purchase the defendants' first number, with the view of possessing that edition, instead of purchasing copies of the fifth edition, belonging to the plaintiffs; and that, in the greater number of instances in which the defendants' first number had been purchased by the public, the same would not have been purchased but for the aforesaid false and unfair announcement. The bill prayed the usual account of the profits made by

the sale of the defendants' first number; and that the defendants might be restrained from selling or disposing of any copy of the first number of the announced edition, or any future number, having with or upon it, or the cover or wrapper thereof, the announcement respecting the nature and contents of such publication; and from in any manner printing, publishing, or causing to be printed or published, any advertisement, statement, or announcement, to the purport that any edition of the said commentary or work published, or to be published, by the defendants, did or would contain the whole of the commentary and observations of Thomas Scott, as written by him, or as bequeathed by him to the world, or the whole of the last corrections, improvements, and additions made by Thomas Scott to his Commentary or work, or to any like effect.

The plaintiffs, on the 5th of February 1841, obtained from the Vice Chancellor, an *ex parte* injunction against the defendants, to the effect prayed by their bill.

The defendants filed their joint answer on the 4th of March, and thereby (amongst other things) stated, that the fifth edition of Thomas Scott's Bible was defective, and did not contain the chronological index, or those parts of the first edition, intitled tables of proper names, of promises, or of types; that they believed that many of the alterations, contained in the fifth edition, were made not by Thomas Scott, but by William Rutter Dawes, or some other person; that in numerous instances the notes and practical observations contained in the fourth edition, as they were edited by Thomas Scott, were altered or varied without necessity, and without any improvement being thereby effected; that in very many instances sentences, and parts or members of sentences, contained in the notes and practical observations as they were printed in the fourth edition, were capriciously transposed in the fifth edition; that in other instances injurious omissions were found in the fifth edition; and that in some instances the sense and effect of the notes and practical observations contained in the fourth edition, were injured or weakened by the alterations made therein, and printed in the fifth edition; that the announcement and advertisement, men-

tioned in the bill, were respectively prepared, with the view of stating the nature of the defendants' publication, and its recommendations, and particularly of informing the public that the same would be entirely the genuine composition of Thomas Scott, and would be printed from the last edition, published by Thomas Scott in the vigour of his life, being the fourth edition, in order to distinguish it from the several editions published and announced since his death, and which were altered from the composition of Thomas Scott. The defendants denied that the announcement and advertisement, or either of them, were or was calculated greatly or in any degree to mislead the public as to the nature or the contents of the defendants' intended edition, but, on the contrary, that the same contained a true statement of the nature and contents thereof; and that they did not believe that the public, by reason of the representations contained in the announcement and advertisement, had been induced to purchase the first number of the defendants' edition, with the view of possessing that edition, instead of purchasing the plaintiffs' edition, published in 1822, except that persons might have been induced to purchase the defendants' edition by reason of its being undoubtedly the genuine production of Thomas Scott alone.

On the coming in of the answers—

Mr. Jacob and *Mr. F. J. Hall*, moved, on the part of the defendants, to dissolve the injunction; which was opposed by—

Mr. Knight Bruce and *Mr. Renshaw*, on behalf of the plaintiffs.

The VICE CHANCELLOR being of opinion that the announcement, published by the defendants, was too extensive in its nature, and that the defendants thereby must have intended to hold out to the purchasers of the defendants' new edition, that they were purchasing part of that which was contained in the fifth edition, and was not contained in the fourth edition, refused the motion.

The defendants having appealed from his Honour's decision,—

Mr. J. Wigram and *Mr. F. J. Hall* appeared in support of the appeal.—The real object of the advertisement, is to distin-

guish the last edition of Thomas Scott's Bible, published by him during his lifetime, from all other editions of that work, which were subsequent to that edition, and belonged to the plaintiffs. The principle upon which the Court below must have intended to proceed, was that laid down by this Court in the case of *Millington v. Fox* (1), where there was an actual misrepresentation, and in *Motley v. Downman* (2). In the case of *The Penny Pickwick* (3), before his Honour the Vice Chancellor, in which a somewhat similar question to the present arose, his Honour said, that though a careless observer might be misled as to the work, it was his duty to look and see whether a common and ordinary observer could be misled by it, and if he found he could not, then the case could not be one for an injunction. In the present case, the defendants' edition is openly contrasted with the 5th edition belonging to the plaintiffs, and, therefore, no ordinary reader of the announcement or advertisement could be misled by those documents. The plaintiffs have unfairly attempted to spell out an equity from one single isolated paragraph; the only reasonable and fair construction to be put on the several paragraphs taken together, of the announcement published on the wrapper of the defendants' first number, being an intention on the part of the defendants to publish the undoubtedly unadulterated and genuine edition of Thomas Scott's Commentary on the Bible, and which was the fourth edition; the injunction therefore ought to be dissolved, and thereby the imputation of fraud thrown upon the defendants by the plaintiffs' bill, entirely removed—*The Attorney General v. the Mayor of Liverpool* (4).

Mr. G. Turner and *Mr. Renshaw*, for the plaintiffs, admitted that the case before the Court was one of misrepresentation and not of copyright, and insisted that the publication of the announcement on the wrapper ought, at least, to be restrained, inasmuch as in that document nothing at

(1) 3 Myl. & Cr. 338.

(2) 3 *ibid.* 1; s. c. 6 Law J. Rep. (n.s.) Chanc. 308.

(3) Not reported.

(4) 1 Myl. & Cr. 171; s. c. 7 Law J. Rep. (n.s.) Chanc. 51. Vide observations, pp. 210—1.

all tantamount to the statement contained in the *advertisement*, viz. that the defendants' intended new edition was to be printed "without interpolation or omission from the last edition published by Mr. Scott in the vigour of life," could be found, and that the expression, "precisely as the amiable and learned commentator bequeathed his labours to the world," could only mean as he bequeathed (that is, left) them to the world at his death, with those alterations which had been made in the Commentary between the period of the publication of the fourth edition and the time of Thomas Scott's death in 1821; that the spirit and meaning of the announcement contained on the wrapper of the defendants' first number, amounted to nothing less than a description of the fifth edition belonging to the plaintiffs, which was advertised to comprise the last corrections and additions of Thomas Scott; and that the representation published to the world on the wrapper of the defendants' first number, was fraudulent and false in fact, and calculated to deceive the public.

The LORD CHANCELLOR.—The injunction in this case, which the present motion seeks to discharge, restrains the defendants from publishing the edition of Scott's Bible, which they have commenced publishing in numbers, with a certain wrapper, containing a certain description of the book, which I shall presently refer to, and also from publishing "any advertisement, or statement, or announcement, to the purport or effect, that any edition of the said Commentary or work published or to be published by them, contains, or will contain, the whole of the commentary and observations of Thomas Scott, as written by him, or as bequeathed by him to the world, or the whole of the last corrections, improvements, and additions made by the said Thomas Scott to his said Commentary or work."

Now, the first observation that strikes me upon that is, that as I read the advertisement, no such advertisement ever appears to have been published; it is assumed that the advertisement announces to the world that the edition published by the defendants, contains all the last corrections, improvements, and additions made to the work by Thomas Scott, but I observe,

upon referring to the advertisement, that it appears to me to do anything but answer that description. So far, therefore, as that advertisement forms part of the injunction, I can find nothing whatever to support it.

The other part of the injunction, which sets out at length that which is contained on the wrappers of the numbers of the defendants' edition, is the subject which arises for consideration.

Now it is not a question of piracy at all, because it is admitted that the defendants have not published anything of that in which the plaintiffs claim the copyright. They have not published any of those alterations or additions which are found in what they call the fifth edition, namely, the plaintiffs' publication, as distinguished from what is contained in the edition which the defendants have published. It is admitted that the fourth edition is not covered by any copyright, at least not that part of it which has been published; and there is no case made, or attempted to be supported, upon the ground of the defendants having or intending to commit any piracy upon that part of the fourth edition, the copyright of which has not yet expired.

It is not, therefore, disputed, that the defendants have a right to reprint all that is in the fourth edition. It is equally clear on the other hand, and not disputed, that the plaintiffs have a copyright in what they call the fifth edition. What that fifth edition consists of, is not so very clearly to be ascertained from the affidavits, as one might really have expected from those who are the proprietors of the fifth edition, and who therefore must have the means of informing the Court of what that edition consists.

There seems, however, to be no doubt but that Thomas Scott, the author of the former edition, did, subsequently to the publication of the fourth, employ himself in making various alterations and additions to his observations and notes to that fourth edition, and therefore that there existed, at the time of his death, compositions of his, which were the subject-matter of copyright, and to which the plaintiffs are entitled. If everything that has been published in the fifth edition, consists of that which Mr. Scott himself wrote, why their description of the work is correct. If, on

the other hand, the fifth edition contains not only what Mr. Scott himself added to the fourth edition, but contains any matter added by others, then there may equally be a copyright in that fifth edition; but the description of it as published by the plaintiffs, does not accurately represent what that fifth edition is.

Now, the complaint against the defendants, (if I can understand what the object of the injunction is from the terms used,) would assume that the defendants had announced to the world that they were publishing something more than was contained in the fourth edition, namely, the last alterations, corrections, and improvements of Thomas Scott; and the question therefore to be considered upon the evidence is, whether what the defendants have announced to the world, either in the advertisement, or on the wrapper to the numbers which they have published, does represent that what they profess to publish is more than that which was published in the fourth edition; it being admitted that they have a present right to publish what they have already published, and is contained in the fourth edition.

Now, it is one thing, having regard to that question and the case made by the plaintiffs, to consider whether their complaint is, that the defendants have announced that their work contains that which is exclusively the property of the plaintiffs. If it does, then to be sure it comes within the principle on which the injunction seems to have been granted, and might be very properly the subject of an injunction, but it might also be a proper subject, I apprehend, for an action at law. On the other hand, if the complaint is, or rather ought to be this, not that the defendants profess to represent that they are publishing anything more than what was contained in the fourth edition, but that they represent that the fourth edition contains all that could safely be attributed to Thomas Scott, and that any other editions or works professing to contain additions of Thomas Scott were not to be regarded either as genuine or as being finished by Thomas Scott, so as to be considered alterations and improvements under the authority of Thomas Scott, why then, that representation, unless proved to

be true, might undoubtedly be the subject of complaint, inasmuch as it might be a libel upon, or a disparagement of the work published by the plaintiffs; but could not be a proper subject for an injunction, because the Court does not interfere by injunction to prevent publications or libels, which might be injurious to the property of others. It deals with the subject as questions of property, and not as questions of individual interest.

That distinction is very important to be kept in view, for in the one case there would be no subject-matter for an injunction, and in the other I apprehend the principle established in the cases of *Sykes v. Sykes* (5) and *Blofeld v. Payne* (6), would entitle the plaintiffs to maintain an action against the defendants for professing to sell that which is the property of the plaintiffs.

Now, keeping in view what is the history of these two works, and the undoubted right to publish all that is contained in the fourth edition, and the claim set up by the defendants, that what they are publishing is that which all the world has a right to publish, (namely, that which the defendants have already published, and is contained in the fourth edition,) but also the subsequent alterations and improvements made by Thomas Scott himself; it seems to be not more than necessary just to look at the terms of the advertisement—not as it is set out in the injunction, for that leaves out the part of the advertisement which explains its meaning—but as it exists in point of fact. The advertisement announces the publication of *Fisher's Illustrated Edition of the Rev. Thomas Scott's Bible*, and it says, "To prevent the possibility of misconception, the publishers state distinctly that Fisher's edition of this standard and inestimable Commentary will include, besides the authorized text of the Holy Scriptures, the commentary, notes, marginal references, and practical observations, not as re-edited and mutilated by a different hand, and an inferior mind, but as the author wrote them, printed without interpolation or omission from the last edition published by him in the vigour of life."

(5) 3 B. & C. 641; s. c. 3 Law J. Rep. K.B. 48.

(6) 4 B. & Ad. 410; s. c. 2 Law J. Rep. (N.S.) K.B. 68.

The last edition published by Thomas Scott himself was the fourth edition. It seems to be quite impossible to read that, without understanding the meaning to be, to announce that the fourth edition was the only one that could be safely looked at as containing the works of Thomas Scott, and the defendants published that as being the only document containing the works of Thomas Scott, holding up as perfectly valueless, (not specifying by description the fifth edition,)—but holding up as valueless, and not to be trusted, any other which might profess to contain any matter as coming from Thomas Scott, other than that which is contained in the fourth edition.

Now, that may be perfectly false, for there may be a great deal in addition to that which is contained in the fourth edition composed by, and therefore coming from Thomas Scott; and it may be that the representation that it is not to be trusted may be without foundation; but that would not form the subject for an injunction. The question is, whether by this advertisement, anybody could suppose that the defendants were announcing that their publication contained any subject-matter composed by Thomas Scott, after the publication of the fourth edition.

It appears to me not only not to be the reasonable construction of this advertisement, but that the whole terms of the advertisement are calculated to lead to a totally different construction. It seems not only not to adopt any matter composed subsequent to the fourth edition, but to announce to the world that nothing but what is contained in the fourth edition, is to be considered as the genuine work of Thomas Scott.

That material part of the advertisement, which explains the former part, is omitted in the injunction, which terminates with the words, "last corrections, improvements, and additions made by the said Thomas Scott to his said Commentary or work," leaving out entirely the reference to the fourth edition, which shews what was the meaning of those by whom that advertisement was composed. Well, then, this alludes in terms to the fourth edition, the last edition published by Thomas Scott in his lifetime; that is

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one subject-matter of this injunction. The other is the wrapper, which is more at length, but which does not appear to me to be capable of any different construction from that which I have stated to be the only construction I can put upon the advertisement. Upon the wrapper, (amongst other expressions which are not material to be attended to,) the description is as follows—"The invaluable character of the Commentary rendering any infringement or abbreviation mischievous, economy in bulk has been effected by the employment of smaller type and an expanded page, so that three quarto volumes may contain the whole unadulterated labours of the author, not as re-edited by a different hand and inferior mind, but precisely as the amiable and learned commentator bequeathed them to the world. This edition is printed from the last, which the author published in the vigour of life." That edition is the fourth.

It has been supposed, that the words, "precisely the same as the amiable and learned commentator bequeathed them to the world," taking these words by themselves, either mean a bequeathing to the world by publication to the world, which is quite obviously the meaning in which they are used in this paragraph, or as they seem to have been understood elsewhere, viz. that when Thomas Scott bequeathed them to the world, he prepared them for the use of the world; but when those words are taken in connexion with the expressions immediately following, it is quite obvious the authors of that paper meant, (and whoever reads the paper must understand it to mean,) that by bequeathing it to the world, Thomas Scott was giving it to the world in the shape and form of a publication, and which publication was the fourth edition.

Now, on considering what is expressed, and reading it carefully, and looking at the construction any reasonable man would put upon the paper, and being of opinion the injunction cannot be supported, except upon a reasonable construction to be given to the whole documents, and not to a particular paragraph, it appears to me, that neither in the advertisement nor the wrapper, is there anything held out to the world that the defendants intended to publish that of which the plaintiffs had the copy-

right. The real question to be considered in this case is, the meaning of the *whole* of the document when taken together, and not the meaning of a part of it; because, that a particular expression may bear a different construction, and may lead to the conclusion contended for by the plaintiffs, is not denied, but that is not the question to be tried. The question is not absolutely a question of fraud, because a party may represent that he is publishing that which belongs to another, or selling that which belongs to another, without intending fraud; but if he does, the party has a right to the protection of this Court; but it is not a particular word or a particular expression that will give the party that right, but you must read the whole of the document, and it must appear to be either an intentional misrepresentation, or a representation calculated in point of fact to lead others to believe, that when they are buying that which the defendants offer for sale, they are buying that which is the exclusive property of the plaintiffs.

This case, therefore, not being a question of copyright, it is within the principle of those cases which have been decided upon tradesmen using the mark of one kind or another belonging to the party complaining; it is not a piracy; it is not that you are selling that which the other party has the exclusive right to sell, but it is a representation you are holding out to the world, that you are selling that which the other party has a right to sell, and has a right to be protected against a representation that other persons are selling those goods to persons, who buy under the idea that they are buying the goods of the plaintiffs. That is a principle which this Court acts upon, by protecting parties by injunction; and it is a principle also which courts of law will enforce, by giving damages or supporting the action, at least where it appears such a course of conduct has been pursued by the defendants. I apprehend, on the principle of those cases, that if the plaintiffs think they can, upon the principle of the cases I have referred to, induce a jury to believe that these documents (this advertisement and wrapper) really do represent that the defendants were about to publish the compositions, notes, and improvements of Thomas Scott,

made subsequently to the publication of the fourth edition, or subsequently to the time when the last edition was published in his lifetime; and that they may be able to maintain an action, and get a verdict, they may come back here for the additional protection the injunction may give them, (having the verdict and authority a judgment at law will give them,) but till that is done, and till the opinion of a jury shall tell me that I have come to a wrong conclusion upon the construction of these instruments, I cannot put the construction upon them, which the plaintiffs seek, and, therefore, I am bound to dissolve the injunction.

L.C. }
 April 30; } BYDE v. MASTERMAN.
 May 1. }

Exceptions—Impertinence—11th Order of 1828—Answer—Pleading.

A, an infant, filed a bill against trustees, wherein she sought, in the usual terms, an account of the lands, &c. of which B. had died seised, A. claiming to be interested therein. The trustees, in a schedule of considerable length, annexed to their answer, set forth in particular detail the names, acreage, boundaries, &c. of all the lands of which B. had died seised:—Held, that although some parts of the schedule were not impertinent, yet the matter contained in the schedule, being unnecessarily prolix, and tending to oppression from its length, was properly excepted to by the plaintiff as impertinently set forth.

Semble—The 11th Order of Court of 1828, does not apply to such a case.

Norway v. Rowe, 1 Mer. 347, recognized as an authority in cases similar to the present, notwithstanding the 11th Order of Court.

The bill was filed by Emma Louisa Bye, an infant, by her next friend, against two trustees, and the personal representative of a deceased trustee of certain real estates, and other parties, seeking an account of the trust property, and that the trustees might be declared responsible to the plaintiff for certain losses sustained by the mismanagement of the same; and it sought to know

the title under which the property, consisting of lands, manors, &c., was conveyed, and whether T. H. Byde, the testator, mentioned in the bill, was not seised of certain lands, &c. in the common way. The defendants, the two trustees, by the schedule to their answer, set forth a long, and very minute and particular and diffuse detail of each particular field, and the acreage, names, and boundaries thereof respectively, &c., the answer stating that the messuages, farms, lands, and hereditaments, inquired after by the bill, were particularized in the schedule thereto annexed.

The schedule referred to in the defendants' answer, occupied nearly ninety folios.

Eleven exceptions having been taken by the plaintiff to the matter contained in the schedule, five of them were disallowed by the Master, and six of them allowed. The defendants thereupon excepted to that part of the Master's report, which allowed the six exceptions; and the Master of the Rolls, on the hearing of the defendants' exception, and on the authority of the 11th Order of 1828, and the case of *Wagstaff v. Bryan* (1), decided in favour of the defendants, on the ground, that some part of the matter comprised in each of the plaintiff's exceptions, was pertinent. The plaintiff appealed from his Lordship's decision.

Mr. J. Wigram and *Mr. Collins* appeared for the appellant.

Mr. Bethell and *Mr. Piggott*, for the respondents.

The following cases were cited on the argument before his Lordship:—

Norway v. Rowe, 1 Mer. 347.

King v. Teale, 7 Pri. 278.

Beaumont v. Beaumont, 5 Madd. 51.

Wagstaff v. Bryan, 1 Russ. & Myl. 28;
s. c. 8 Law J. Rep. Chanc. 41.

Tench v. Cheese, 1 Beav. 571.

Alsager v. Johnson, 4 Ves. 217.

French v. Jacko, 1 Mer. 357, n.

Parker v. Fairlie, Turn. & Russ. 326;
s. c. 1 Law J. Rep. Chanc. 19.

Gompertz v. Best, 1 You. & Col. 114;
s. c. 4 Law J. Rep. (n.s.) Ex. Eq. 17.

Lowe v. Williams, 2 Sim. & Stu. 574;
s. c. 4 Law J. Rep. Chanc. 199.

(1) 1 Russ. & Myl. 28; s. c. 8 Law J. Rep. Chanc. 41.

The objections raised by the respondents, and the more material cases cited at the bar, being particularly observed upon by his Lordship in the judgment, it has not been thought necessary to insert the arguments of counsel.

THE LORD CHANCELLOR.—His Lordship, after stating that he had looked over the schedule to the answer, and considered the case, and that the difficulty would be insurmountable in the practice of the court, if the order of the Master of the Rolls were permitted to stand, proceeded as follows:—There is a difficulty in dealing with the practice of the court, declared in the 11th Order of 1828, as acted on in the case of *Norway v. Rowe*; and we all know the inconvenience of not having the particular parts of an answer, which are objected to, specified. In order to give effect to the 11th Order, the rule in *Norway v. Rowe* is necessary to be acted upon, because, if a party could succeed in shewing that any part excepted to, however trifling, is pertinent, there was an end of the rule. In the case of *Norway v. Rowe*, the schedule to the answer extended to very many folios in number, and you might have subdivided a schedule of that length into as many exceptions as there were passages contained in it, if the rule contended for by the defendants, had been enforced in that case. That cannot be the practice of the Court. Well then, what course is to be adopted in a schedule like the present? I am not taking the case where there is a totally different subject-matter, and where one part is pertinent and the other is impertinent, but where the subject-matter is so mixed up, as to make it extremely difficult to separate the one part from the other, as in *Norway v. Rowe*. The objection taken by Lord Eldon, in *Norway v. Rowe*, was not that the matter was impertinent, but that it was given in an oppressive mode, and the defence was framed in a manner not required by the plaintiff, and not necessary for the purpose of the defendant, and therefore given in a mode the Court could not sanction. In that respect, it was considered impertinent; and in *Alsager v. Johnson*, and also in the case of *Beaumont v. Beaumont*, the matter objected to was held impertinent, because it was set out in

an impertinent manner, and too diffuse; and the setting forth of the matter in such a manner may have been done either for the purpose of oppression, or from mere negligence or ignorance, and for want of taking the trouble of wording it in a proper shape, or of reducing it to a proper form: indeed, these matters may generally be referred to the latter cause, rather than to an intention to injure the plaintiff. It is, however, quite immaterial what the cause is, the simple question being, whether, when such a case is brought forward, this Court can sanction it. I am not disposed to throw upon the Master of the Court, nor on the plaintiff, who comes to complain of the defendants' conduct, the labour of analyzing a long schedule, and of finding out what parts of the numerous passages in it are impertinent, and what are not so: Lord Eldon declined doing so; and in *Norway v. Rowe*, that learned Judge said, that the matter was set forth in a manner which was unnecessarily prolix, and tending to oppression; and the party putting such matter into his answer, must take upon himself the burthen of separating the one part from the other, or must take the consequences. The matter must either be dealt with in that way, or the plaintiff must be compelled to divide the schedule into as many exceptions as there are parts or passages in it; and to avoid that state of things, I think it best to adopt the principle laid down by Lord Eldon. Under these circumstances, although I cannot say there may not be some passages in the schedule which are necessary, yet they are so mixed up with other matter, that I have no hesitation in saying that this case is within the principle of *Norway v. Rowe*, and that the schedule is altogether impertinent; and so seemed to think the Master of the Rolls, but he considered himself more bound by the 11th Order of 1828, as construed in the case of *Wagstaff v. Bryan*, than the case of *Norway v. Rowe*. I can find no part of the schedule to the answer in the case before me, which can be detached from the rest; one objection, therefore, of the respondents is thus removed.

Another objection raised on the part of the respondents is, that the Court cannot entertain the present application, because

the exceptions are in respect of matter "impertinently set forth;" whereas, the reference to the Master was to inquire whether the matter was impertinent: it is, however, too late to take such an objection; but if it were not, it will be observed, that the very words objected to, have Lord Eldon's sanction. No person can doubt the meaning of the parties, and the Master of the Rolls deemed the schedule impertinent, as being impertinently set forth, but he conceived the 11th of the Orders of 1828, precluded him from giving effect to the exceptions; on the contrary, I am afraid there would be no remedy in a case of this nature, or in a case tenfold worse than this; because the worse the case, the more difficult is it to deal with. The only way, therefore, of preserving the jurisdiction of the Court, on a motion of this nature, is to treat the whole schedule as impertinent. This course is not now introduced for the first time; it was pursued in the case of *Alsager v. Johnson*, and I must, therefore, direct the order of the Court below to be discharged.

M. R. }
May 3, 4, 5, 8. } ADDIS V. CAMPBELL.

Reversionary Interest, Sale of—Inadequate Consideration—Fraud.

A, who was entitled to a reversionary interest in real estate, sold it to C. under circumstances which would have induced the Court to set aside the transaction, on the ground of fraud. The tenant for life was aware of these circumstances, but some years afterwards purchased the reversion from C. for a fair consideration, which was paid to C, and C. induced A. to join in a recovery, and in the conveyance to the tenant for life. A. continued in destitute circumstances up to his death. Nearly twenty years after the sale to C, a bill being filed by the eldest son of A. to obtain the estate, the several sales and conveyances were ordered to be set aside.

Under the will of Francis Gostling, who died in 1806, Francis Gostling, the younger, was entitled for life to certain freehold and copyhold hereditaments, with remainder to his issue in tail, with remainder to

Mildred Addis, for life, with remainder to her first and every other son successively in tail.

Mildred Addis died in 1818, leaving Henry Joseph Addis, her eldest son, who was then about thirty-five years of age.

In October 1818, Henry Joseph Addis was desirous of selling his reversionary interest in the freehold and copyhold estates, comprised in the will of Francis Gostling, the testator, and it was advertised to be sold by public auction; but before the time at which the auction was to have taken place, H. J. Addis entered into a contract with John Crook (who was a Quaker,) to sell his interest in part of these estates for 500*l.* Shortly afterwards, at the suggestion of Mr. Charles Addis, who was a solicitor, and a relation of H. J. Addis, Crook signed an undertaking to pay to H. J. Addis a further sum of 800*l.*, in case Francis Gostling, the younger, should die without issue. H. J. Addis afterwards agreed to include his reversionary interest in some other estate in the same sale, and Crook was to pay him 625*l.* instead of 500*l.*, and gave him a bond for 1,000*l.* instead of 800*l.*, to be paid in the event before mentioned.

By indentures of the 19th and 20th of April 1819, H. J. Addis, in consideration of 625*l.*, and a bond for 1,000*l.*, to be paid in the event before referred to, conveyed his interest in this estate to Crook, and covenanted to levy a fine and suffer a recovery.

The bond for 1,000*l.* was shortly afterwards bought from Addis, by a friend of Crook for a small sum of money.

On the 19th of April 1828, Francis Gostling, the younger, wrote a letter to a Mr. Costigan, who had made an application to him for assistance for H. J. Addis, to the following effect:—"The father, Henry Addis, was here on Tuesday last. I franked him up and back again to no purpose. The attempt was made to file a bill in Chancery against the man who bought Henry's reversion by private contract, as the Chancellor sets aside all purchases of this nature, in which he must have succeeded. It was advertised to have been sold by public auction, but the Quaker attended on Henry some weeks in London, and closed for 500*l.*, nothing like

one year's rent of the estates. A more rascally transaction was hardly ever known. A further bond was procured by Charles Addis for 1,000*l.*, payable when this man got possession of the property, which bond Henry sold to the Quaker's friend for 50*l.*, as I am well informed, and it now remains with the Quaker. * * * When Henry was here, I found him totally void of truth."

H. J. Addis threatened to take proceedings to set aside the sale to Crook, and Crook paid to him several small sums (frequently 1*l.* a week) to induce him to abstain from any such steps.

In October 1828, John Crook entered into an agreement with Gostling, the tenant for life, for the sale to him of the reversionary interest for 6,500*l.*, and Crook was to prevail upon Addis to join in suffering a recovery, in order that Gostling might obtain a fee simple. This plan was carried into effect, and a recovery was suffered by Addis in Michaelmas term, 1828, and the bond for 1,000*l.* was delivered up by Crook to Gostling. The annual rental of the estates at that time was stated to be about 600*l.*

Crook died in 1831, H. J. Addis in 1832, and Gostling in 1835. The plaintiff was the eldest son of H. J. Addis, and attained twenty-one in 1834, and the bill was filed in 1838 against the devisees of Francis Gostling, the younger, and the personal representative of Crook.

The bill prayed a declaration, that the said sales and conveyances were fraudulent and void, and that the defendants, or some of them, might be decreed to execute to the plaintiff all necessary conveyances for vesting the estates in question in the plaintiff.

Mr. Pemberton and *Mr. Piggott*, for the plaintiff.—The original sale to Crook was of such a description, that the Court would have felt no difficulty in setting it aside, if a bill had been filed for that purpose. The unsettled character and the destitute condition of Addis, and the gross inadequacy of the consideration paid to him, rendered it impossible that such a sale could be sustained. But Gostling was aware of all these particulars, and spoke of the sale as a rascally transaction. He therefore purchased the property, subject to all such equities as existed against Crook.

Baker v. Bent, 1 Russ. & Myl. 224.

Barnardiston v. Lingood, 2 Atk. 133.

Bowes v. Heaps, 3 Ves. & B. 120, and the cases there cited.

Boswell v. Mendham, 6 Madd. 373.

Mr. Kindersley, Mr. S. Sharpe, and Mr. Roupell.—Addis was advised by his relative, who was a solicitor, to sell his reversion by public auction, and after the sale was made by private contract, he was advised to file a bill to set it aside. But he thought proper to disregard this advice, and after having had several years to consider the subject, he acquiesced in the sale to Mr. Gostling, and joined in the conveyances to him. If the original sale to Crook might have been set aside, still the purchase by Gostling was a fair transaction, and free from any fraud whatsoever: and no attempt was made to impeach it till nearly twenty years had elapsed, and almost all the parties were dead who could have given an account of it.

M^{rs} Queen v. Farquhar, 11 Ves. 467.

Mr. Pemberton replied.

May 8, 1841.—The MASTER OF THE ROLLS (after stating the case).—Henry Joseph Addis, at the time of the transaction in question, was about thirty-five years of age: he was a person of an exceedingly unsettled, reckless, and improvident character, being reduced by profligacy and improvident conduct to a state of the greatest destitution; and he is shewn to have resorted to guilty and dishonest means, to relieve himself from the wretched state of distress to which he was sunk. It is not shewn, in this case, that he was absolutely of unsound mind, but it is plain such a person was exceedingly open to temptation; and, if not incapacitated from binding himself in legal transactions, was incapable of protecting himself with ordinary prudence, and very likely to be imposed on: and this state of mind, though not sufficient to make his transactions legally void, is an element most important to be considered on a question, whether a deed has been obtained by fraud, circumvention, and undue means. It is not denied, that the consideration was grossly inadequate to the value; and the

evidence shews a case of fraud, such as can leave no doubt that the transaction must have been set aside, if due application for the purpose had been made to this Court. The attempt made by Charles Addis to prevent the fraud, and afterwards to procure some additional benefit to Henry Joseph Addis, cannot, I think, be considered as any confirmation of such a transaction as this. Francis Gostling was tenant for life in possession of the property. He was desirous to keep it in the family; and, if H. J. Addis's reversionary interest had been sold by auction, he was willing to purchase it at a fair price. He was considerably disappointed by the transaction with Crook, and he expressed himself indignant at the conduct of both Crook and H. J. Addis, and on various occasions stated his impression, confirmed by Charles Addis, and probably by others, for it appears he was in communication with other solicitors, that by filing a bill the transaction might have been set aside. On the evidence which is given in this case, I am of opinion, that Francis Gostling perfectly well knew that Crook had committed a gross fraud on Addis, and that the transaction might be set aside in equity; and he was at the same time greatly offended at Addis for making a sale by private contract, instead of by auction, which would have given to himself (Gostling) an opportunity of purchasing the estate at a fair value. [His Lordship referred to Gostling's letter to Mr. Costigan, of the 19th of April 1828]. Up to this time no imputation whatever rests on Mr. Gostling. Knowing the transaction to be voidable, and wishing it to be set aside by the act of H. J. Addis, and at the same time entertaining a rational and fair desire to become the owner of the property himself, it is very probable he wished the transaction to be set aside, in order that he might become, as he originally intended to be, the purchaser from Addis. What was the inducement which he offered to Addis to file a bill, what (if any) assistance he proposed to give, or what motives influenced H. J. Addis to refuse to interfere—all those are circumstances quite unknown. But I think it may reasonably be inferred from the letter of the 19th of April 1828, that Addis had not consented

to take any proceedings; and it seems that very soon afterwards, Gostling became desirous of purchasing the estate from or through the means of Crook. He was owner of the estate for life: he was desirous of being owner in fee. From Crook he could only obtain a base fee, in addition to his own life estate: but if Addis could be induced to join, recoveries might be suffered, and an estate in fee simple might be obtained. In this state of things, it is said by one of the defendants, in his answer, that Gostling was advised that he might safely and properly make the purchase, if he paid to Crook the full and fair value of the interest to be purchased, provided also that H. J. Addis was made a party, and joined in and confirmed the conveyance, and was made a party in suffering the recoveries. It seems to have been most justly considered, that the transaction with Crook required confirmation; but it is not easy to conjecture how it came to be supposed, that a consideration paid to the party who had committed the fraud could have any effect whatever in binding the rights of the party upon whom the fraud had been committed. The question in this case is, whether Gostling took the requisite means of obtaining a safe and proper purchase; and it is very extraordinary, that knowing as he did that the purchase of Crook was voidable by reason of the fraud which Crook had practised, he should contract with Crook not only for the interest which Crook professed to have purchased, but also for those acts which were required to be done by Addis, for the purpose of acquiring the title which Gostling desired to have. H. J. Addis was a person destitute, and peculiarly liable to be imposed upon. Crook was a person not only capable of practising a fraud, but who had actually practised a fraud in this very matter: and yet Gostling, wanting an act to be done by Addis, and knowing the fraud already practised by Crook, engages Crook to procure from Addis the further act which was required to be done; and he in no way concerned himself with the means by which the concurrence of Addis was to be obtained. Addis, with his reckless and improvident habits and disposition, was not only left exposed, but was actually

subjected to the influence of the same person, who had already imposed on him. That Gostling intended himself to commit a fraud, or intended wilfully to cause a new fraud to be committed on Addis, is, in my opinion, very unlikely. I think it most probable he intended to give the true and just value for the property, and thought Addis would never attempt to enforce his rights, or take any advantage of them. But, contracting, as Gostling did, with Crook alone, knowing the fraud which had been practised by Crook, paying to Crook alone what he may have thought the true and just value of the estate, he was in fact paying to Crook the whole price of his fraud. And whatever consideration was paid, seeing that it all moved to Crook, and no part of it to Addis, except through the means of Crook, I am of opinion, that by such a dealing as this, Gostling could not place himself in a better situation than that in which Crook already stood; and that by the whole transaction, notwithstanding his payment, he subjected himself as towards Addis, to the same responsibility to which Crook was already subjected. Crook, by a continuation, or by a repetition, of fraud, similar to that which he had previously practised, obtained from Addis that concurrence in the conveyance which Gostling desired, and for which he paid Crook alone. Gostling, probably not designing, but in effect, and with knowledge which ought to have put him completely on his guard, procured Crook to continue or repeat that fraud.

With the knowledge he possessed, and after his mode of dealing, I think it became incumbent on him, and on those claiming under him, to be able at all times to shew that the transaction between Crook and Addis was fair, and that Addis received a fair and full consideration: nothing of this kind is even attempted to be shewn. Addis was left a victim to the contrivances of Crook: and those who advised Gostling never concerned themselves to see whether Addis was fairly dealt with, or received any consideration whatever; and it has been contended, in argument, that they were under no obligation to do so. I infer from some of the correspondence, that some communication by letter had

taken placé between Addis and Crook in reference to this matter. But the evidence appears to me to shew, that Addis was as much defrauded by Crook in the second transaction, as he had been in the first. He was induced to convey away a reversionary interest, which was worth several thousand pounds. In return he received no title whatever to anything, and remained dependent upon the voluntary performance, by Crook, of a verbal promise to pay 1*l.* a-week. Not thinking it important, whether the sum paid by Gostling to Crook was the value of the reversionary interest, subject to the contingency with which it was affected, or not, it does not appear to me to be necessary to consider very minutely the evidence of value which has been given. Whatever was the payment to Crook, I think that, by the transaction, Gostling placed himself only in the situation in which Crook stood in relation to Addis. And as Crook's transaction with Addis was fraudulent, and Gostling was, under all the circumstances, affected by it, I am of opinion, that the plaintiff, as the person who would have been entitled if the fraud had not been practised, is now entitled to be relieved. I must therefore declare the transaction to be fraudulent: and all necessary parties with the defendants must concur in a reconveyance to the plaintiff. There must be an account taken of the rents which have accrued due since the death of Gostling; and, on the other hand, an account of all the sums paid by Crook in respect of this transaction, whether the payment was made to Addis himself, as the 625*l.*, or whether anything was paid on the bond to another; and in respect of all the annuities which he may have paid, there must be an account of those, with interest on them, and credit must be given for them.

M.R. }
May 8. } NICKLIN v. PATTEN.

Practice. — Contempt — Exceptions to Answer.

A defendant, who was in contempt for want of answer, put in his answer, but did

not pay the costs of the contempt till several days afterwards:—Held, that the two months for excepting to the answer were to be computed from the day on which the answer was filed.

The defendant in this suit was taken into custody on the 10th of February 1841, under an attachment for want of answer.

On the 20th of February, the defendant filed his answer, but without paying the costs of the contempt, and the plaintiff refused to take an office copy of it till these costs were paid, and was about to serve notice of a motion to take the answer off the file. On the 27th of February, the defendant paid the costs of the contempt. On the 21st of April, the plaintiff filed exceptions to the answer, and on the 3rd of May obtained the usual order of reference of the exceptions.

The defendant now moved that the order of the 3rd of May might be discharged for irregularity, on the ground, that the two months within which the plaintiff ought to have filed his exceptions under the 4th Order of April 1828, were to be computed from the 20th of February, the day on which the answer was filed, and, consequently, expired on the 17th of April. The defendant, on the other hand insisted, that the answer ought not to be considered as filed until the 27th of February, the day on which the contempt was cleared.

Mr. Pemberton and Mr. Heathfield appeared in support of the motion; and—

Mr. Girdlestone opposed it.

Sidgier v. Tyte, 11 Ves. 202; and the 24th Order of 1831, were referred to. See also 1 *Smith's Chanc. Prac.* 2nd ed. p. 133.

The MASTER OF THE ROLLS said, he must not depart from the words of the order. If the plaintiff had not sufficient time to prepare exceptions, he might have applied to the Court for leave to file them after the expiration of the two months; but he had mistaken his course, and his Lordship must, therefore, grant the application.

L.C. }
 April 30; May 5. } WALKER v. LORD ABING-
 DON.

Renewal—Copyhold for Lives—Surrender—Custom—Fine—Costs—Laches—Parties.

Certain copyhold property, situate in a manor in which copyholds were held for lives only, and were renewable on payment of a fine, the amount to be ascertained and agreed on between the lord and the tenant, was surrendered by L, the surviving life, "to the intent and purpose that the lord of the manor might re-grant the same to J. M, or such other person or persons, and for such life or lives, estate or interest as should be agreed on between the lord and J. M." M. was never admitted to the premises, but assigned his interest, by way of mortgage, to A. and B, who entered into possession of the copyhold property. After the death of L, the lord took possession, whereupon A. and B. filed their bill against the lord, praying that he might be compelled to grant the copyholds comprised in the surrender to the plaintiffs, or one of them, for their or his lives or life, or to some other persons or person, by the direction of the plaintiffs, for their or his lives or life, or to make such other grant or grants thereof as the plaintiffs were entitled to have made according to the custom of the manor. The lord of the manor denied that there was any custom under which a tenant for life had a right to surrender in favour of any other persons to be admitted in his place:—Held, that J. M. was a legitimate party to the suit, and that, although instances were adduced in evidence, in which tenants of copyholds situate within the manor had been admitted, in various forms, for one or more life or lives, on a fine being paid, yet that the lord of the manor could not be compelled to renew the copyholds for a life or lives without remuneration; nor unless the plaintiffs could prove a custom existed within the manor to renew for life or lives, on payment of a fine certain.

The bill was dismissed without costs, on account of the laches of the lord in presenting his petition of appeal from the decision of the Court below.

On the 13th of March 1829, Thomas Richard Walker and Joseph Locke filed their bill against Lord Abingdon, as lord

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of the manor of Bechley with Horton, in the county of Oxford, from which it appeared that at a court holden for that manor, on the 25th of April 1803, one Ledwell, the last surviving life named in a copy of court rolls of that manor, dated the 13th of October 1776, was admitted tenant of certain copyhold lands situate within the said manor of Bechley, and that at the same court, Ledwell surrendered into the hands of the lord of the manor, according to the custom of the manor, the same copyhold lands, "to the intent and purpose that the lord of the manor might re-grant the aforesaid premises, with the appurtenances, unto John Mackaness, or such other person or persons, and for such life or lives, estate or interest, as should be agreed upon between the lord and John Mackaness." John Mackaness was not admitted tenant, nor was any grant made to him of the copyhold premises, in pursuance of the surrender. By an indenture of mortgage, dated the 14th of July 1818, John Mackaness, who was then indebted to Walker and Locke, covenanted with those persons for payment of his debt, and that he, his heirs, &c. would, at the request of Walker and Locke, procure himself, or themselves, or John Mackaness, or his heirs, to be duly admitted tenant or tenants to the copyhold premises, and would, immediately on such admission, surrender the same to the use of Walker and Locke, their heirs and assigns, during the life of Ledwell, or for all such further estate and interest as John Mackaness then had or was entitled to, or which he, his heirs, executors, or administrators should or might thereafter have or be entitled to in the copyhold premises, under the surrender thereof to him, or would procure the copyhold premises to be granted immediately from the lord to Walker and Locke, their heirs and assigns, for the life of Ledwell, or such further estate and interest as John Mackaness then had therein. Walker and Locke entered into possession of the copyhold premises immediately after the execution of the last-mentioned indenture, and continued in such possession until January 1829, when the lord (having recently only ascertained that Ledwell had been dead since the year 1809, entered into possession of the copyhold premises, and insisted

2 P

that by the death of Ledwell all the interest of John Mackaness, in the copyhold premises, by virtue of the surrender of the 25th of April 1803, ceased, and that he, as lord of the manor, was entitled thereto beneficially. The bill charged that under the surrender from Ledwell, John Mackaness became entitled to have a grant made of the copyhold premises to him for his life, or to some person or persons for his or their life or lives, according to the direction of John Mackaness, and that John Mackaness was then residing out of the jurisdiction, but that under the indenture of the 14th of July 1818, the plaintiffs were in equity entitled to the same rights under the surrender, as John Mackaness might have had thereunder; and by the prayer it was asked, that the defendant might be compelled to make one or more grant or grants to the plaintiffs, or one of them, for their or his lives or life, or to some other person by the direction of the plaintiffs for their or his lives or life, of the premises comprised in the admittance of Ledwell, and the surrender to John Mackaness, or such other grant or grants of the premises as John Mackaness was, or as the plaintiffs, deriving title through him, were entitled to have made, according to the custom of the manor, and that the plaintiffs might deliver up possession of the premises comprised in the surrender to the plaintiffs.

The defendant, by his answer, filed on the 29th of July 1829, stated, that in the year 1805 he became tenant in tail in possession, and in the following year he became seised in fee simple of the manor of Bechley with Horton, and that from time immemorial the copyhold estates situate within the manor had been and were then holden of the lord by copy of court roll, for lives only: that there were no copyholds of inheritance situate within the manor, and that at the time when he became lord of the manor it had been usual for the lord to take fines from time to time from such of the tenants within the manor as might require a renewal for lives in any of the estates holden by them within the manor, and that such fines were usually such as the lord and tenants could agree upon, there being no custom with regard to such fine, nor any custom within the manor

which compelled the lord, or rendered it obligatory on him to renew. The defendant by his answer denied that either John Mackaness, or any other person or persons on his behalf, ever made or entered into any agreement whatever with the defendant, or any person on his behalf, for any re-grant of the copyhold premises to John Mackaness, or any person on his behalf. The defendant, it appeared, at the date of the surrender was a minor. Neither the plaintiffs nor the defendant entered into any evidence; and the cause coming on to be heard before the Master of the Rolls, on the 17th of July 1830, a reference was directed, to inquire whether, by the custom of the manor of Bechley cum Horton, and the effect of the surrender of April 1803, there remained on the death of Ledwell any and what right and interest in John Mackaness, or any person claiming under him, to demand any and what grant from the lord of the manor of the copyhold in question; and the Master was to be at liberty to state special circumstances. The Master, by his report, dated the 8th of June 1831, stated the fact of certain renewals having taken place in favour of persons of the names of Wood and Agar, in which the fines paid were matters of arrangement with the lord; and he also stated the fact of Ledwell's admittance to and surrender of the copyhold premises at the court baron held in 1803; also Ledwell's death in 1809; and his opinion, that on the death of Ledwell there did not, by the custom of the manor and the effect of the surrender of 1803, remain any right or interest in John Mackaness, or any person claiming under him, to demand any grant from the lord of the copyhold in question.

An exception having been taken by the plaintiffs to the Master's report, the same came on to be heard before the Master of the Rolls on the 20th of July 1831, when his Honour expressed his opinion that, under the surrender of 1803, there remained in John Mackaness after the death of Ledwell, or in the plaintiffs, as claiming under him, a right to demand a grant from the lord of the copyhold in question, for the life of John Mackaness; but the exception was ordered to stand over until John Mackaness had been brought before the Court. Accordingly,

a supplemental bill was filed, and evidence was adduced in the supplemental suit that John Mackaness was out of the jurisdiction of the court. In July 1832, on the exception to the Master's report and the supplemental suit being brought on together for hearing, his Honour ordered the plaintiff's exception to be allowed, and declared that after the death of Ledwell there remained in John Mackaness, according to the custom of the manor of Bechley, a right to claim of the lord of that manor a regrant for his life; and by an order of the Master of the Rolls, made on further directions, dated the 25th of July 1832, the defendant was decreed to admit the plaintiffs to the copyhold estates in question, to hold for the life of John Mackaness; and it was referred to the Master to fix the amount of the fine that ought to be paid by the plaintiffs on such admission, having regard to the circumstances of the case; and it was ordered, that the plaintiffs should be let into possession of the copyhold in question, and an account was directed to be taken of the rents received by the defendant, &c. On the 10th of July 1838, the Master, by his report, certified that the lord of the manor gradually ceased to re-grant the copyhold tenements of the manor on younger or additional lives; and in the year 1778 a general court baron was holden, being the last at which re-grants and valuable exchanges of lives took place, from which time to the year 1813 no general court baron was holden, but from the year 1813 annual general courts were holden for the admission of lives already named in former copies of court roll, and for proclamations for such lives to come in and be admitted, and to enable the purchasers of existing grants to be admitted to hold on the surviving lives already named on the rolls of the manor, and upon which admissions no fines were taken; and the Master further certified that, having regard to the circumstances of the case, he was of opinion that the sum of 65*l.*, being one year's improved value of the copyhold estate, was the amount of the fine that ought to be paid by the plaintiff Locke (the plaintiff Walker being then deceased) on his admission thereto.

The plaintiff took two exceptions to the Master's report; the first was because the

Master found that 65*l.* was a proper fine to be paid by the plaintiff on his admission, whereas he ought to have found that no fine whatever was payable. The second exception was, that if the Master was correct in finding that any fine whatever was payable, he ought to have found that a much smaller sum than 65*l.* was payable.

The defendant also took two exceptions to the same report: the first was, because the Master ought to have certified that the amount of the fine to be paid by the surviving plaintiff, on his admission to the copyhold estate, ought to be left to the judgment or discretion of the defendant, as lord of the manor of Bechley; and secondly, because the Master ought to have certified that a far greater sum than 65*l.* was payable as a fine.

On the coming on of the cause to be heard on general directions and the two sets of exceptions, before the Master of the Rolls, on the 26th of February 1840, his Lordship seemed to think the words of the decree might not enable the Master to come to any satisfactory conclusion, and overruled (as the only course he could pursue) the plaintiff's first exception; and on the plaintiff's second exception, and the exceptions taken by the defendant, he referred it back to the Master, to review his report.

The defendant now presented a petition of appeal from the several above stated orders of the years 1830, 1831, 1832, and 1838.

Mr. Tinney, Mr. Willcock, and Mr. Eade, for the respondent.—There are two questions for the consideration of the Court. The first is, has the plaintiff a right to compel a renewed grant of the copyhold for life? If he has, then secondly, what is the proper price to be paid in such renewed grant. The defendant contends that the copyholds being for lives only, and not of inheritance, there can be no right of renewal, unless the plaintiff can establish in his favour a special custom in the manor; and the defendant further contends that if he is bound to renew, the fine payable is arbitrary. We claim a grant of the copyhold for such life or lives as Mackaness would have been entitled to call for at the date of the surrender by Ledwell, Mackaness having an interest in the copy-

hold, independently of Ledwell, for the lord, by his steward, accepted the surrender of the premises from Ledwell, on the condition of regranting the same, at least for the life of Mackaness. Nor can the lord insist on the amount of the fine being at his own absolute discretion, but only on a fair and reasonable fine; for under the rule of arbitrary fines, where the copyholds are of inheritance, no fine can be insisted on beyond the amount of two years' improved annual value of the premises, and there is no principle on which one year's improved annual value can be insisted on as the amount of the fine payable, where it is in respect of copyholds for lives; and in the case of copyholds granted for more lives than one, the rule is to give two years' annual value as a fine for the first life, and one and a half year's annual value for the second life, and no fine is ever in any case allowed to exceed in amount four years' improved annual value.

Sheppard v. Woodford, 5 Mee. & Wels. 608; s. c. 9 Law J. Rep. (N.S.) Exch. 90.

Wilson v. Hoare, 2 B. & Ad. 350; s. c. 9 Law J. Rep. K.B. 253.

If the lord is bound to admit Mackaness, the admission must be on payment of a reasonable fine, for surely the lord cannot be permitted to insist on a fine that will wholly defeat the plaintiff's right. It is immaterial whether or not Mackaness applied to the lord for the grant during the lifetime of Ledwell, who died in 1809, the lord having held no general court baron between the years 1803 and 1813.

Kerby's case, Freem. 192.

King v. Lorde, Cro. Car. 204; s. c. 1 Watk. Copyholds, 298.

Mr. John Stuart, Mr. Hodgson, and Mr. J. Russell, for the defendant.—In the case of copyholds for lives, a party claiming a renewal from the lord of the manor, must shew a right of admission to the copyholds, on payment of a fine certain.

Wharton v. King, 3 Anst. 659.

Duke of Grafton v. Horton, 2 Bro. P. C. 284.

On referring to the terms of the surrender by Ledwell, which creates the alleged contract, it will be seen that they only refer to some future arrangement to

be come to between Mackaness and the lord of the manor, who was then a minor. There is nothing certain in the terms of the surrender, and one of the grants made by the lord, and mentioned in the Master's report of the 8th of June 1831, is a grant to a person of the name of Wood, as he, Wood, should direct; and another grant there mentioned is to be in such terms as Wood and the lord should agree on; a third grant is to be as a person named Agar should appoint. The case however lies in a very small compass, and the real question is, is there or not a custom shewn to exist in the manor of which the copyholds are holden? It is first necessary to distinguish the alleged custom from that which exists in the case of copyholds of inheritance, and *Wharton v. King* shews the reason of the distinction. In the case of copyholds of inheritance, where no custom exists to the contrary, two years' improved value has been fixed by the law as a reasonable sum to be paid by way of fine on admission, but copyholds for lives have never been held to come within the principle which applies to copyholds of inheritance. In this manor there are no copyholds of inheritance, but there are copyholds renewable for lives, but not on payment of a fine certain. A fine certain presupposes a contract, and must necessarily be a particular sum of money, either small or large, as the case may be; but there can be no fine certain if the amount of the fine is to depend on the value of human life. There is nothing on the face of the surrender which entitles Mackaness to demand a grant of the copyholds for his life, nor do the terms of the surrender precisely define what the estate is which is to be surrendered; and yet, in ordinary transactions relative to copyholds, the surrender describes the estate to which the surrenderee is to be admitted.

Doe dem. Winder v. Lawes, 7 Ad. & El. 195; s. c. 7 Law J. Rep. (N.S.) Q.B. 97.

Church v. Mundy, 12 Ves. 426.

The simple point then is, whether or not there is a custom in the manor to renew, there being no fine certain proved to exist, and no distinct estate is given to Mackaness. Neither were proclamations necessary in this case to enable the lord to seize

the lands, inasmuch as he entered on the efflux of the lives on which the copyholds were holden. In *Baxter v. Conolly* (1), Lord Eldon said, he would not enforce a contract for the sale of a good-will; and the subject-matter of the present case is very like a good-will or something even less valuable. As to the surrender, the lord cannot prevent the entry of it by the steward on the rolls; and such entry is not binding on the lord, inasmuch as anything may be declared in the surrender; and, the steward being only a ministerial officer, he is unable to accept on the part of the lord a surrender which is even in direct contradiction to the custom of the manor. In addition to all this, it is a fact that the present lord was at the time of the surrender in question an infant, and therefore not bound by it.

THE LORD CHANCELLOR.—This appeal calls upon me to review proceedings which commenced with a decree in 1830, and from the time the decree was pronounced the defendant had just as much knowledge of the case which he now presents to my consideration, as he can have at the present moment; and it is certainly much to be lamented, after the lapse of ten years, during which period both parties have been engaged in litigation, and great expense has been incurred, that he should find a question raised, which might just as well, and indeed better, have been raised and decided in the year 1830, than in the year 1841. The practice of the Court affords parties the means of preventing that inconvenience; and if they do not choose to avail themselves of it, they are not entitled to any commiseration for the expense and inconvenience they are exposed to; but those who are opposed to them have certainly very great cause of complaint, that they are, after so much expense has been incurred, called on to defend a case which has been so long decided in their favour. They, however, might have taken the means of having that either brought speedily to a consideration, or else to have been made conclusive long before the present time. After such a lapse of time the Court would certainly feel every disinclina-

tion to disturb proceedings which have been so long established and considered as laying down the rule between the parties, but there being nothing to prevent them from calling under review the proceedings which took place in 1830, although followed by long protracted and expensive proceedings, I am bound to look at the case according to what appears to me to be the rule of law. That must be so under any circumstances, but it is peculiarly the rule of the Court to decide on the case as it appears, and without reference to the conduct of the parties, when it raises a question of considerable importance in point of law, and which, if decided one way, would, in my view of the case, lead to great embarrassment and uncertainty as to the rule of law applicable to property of considerable amount. Now the object of the suit (which was instituted by the plaintiffs claiming under Mr. Mackaness) was to have certain copyhold premises granted under a surrender made by William E. Ledwell, who was the tenant of the copyholds for life. [Here his Lordship read the terms of the surrender.] There was no admittance upon the surrender, and Mr. Mackaness having, as he states, the right to be admitted to some estate under that surrender, assigned and conveyed all his interest in the property to the plaintiffs to secure a debt due to them from him.

The bill rests the title entirely upon that surrender, and is entirely silent as to any agreement or understanding or contract between the lord and Ledwell, who surrendered, or Mackaness, the surrenderee, and puts the case entirely upon the effect of that surrender and the custom of the manor, upon which that surrender was to operate.

Now this is beyond all doubt, from the language of the bill; it is put so distinctly as not to leave any room for doubt as to that being the ground, and the only ground, upon which the plaintiffs rest their case; for they state "that John Mackaness became entitled to have a grant made of the said copyhold premises to him, the said John Mackaness, for his life, or some other person or persons for his or their life or lives, according to the direction of the said John Mackaness." Now it is not attempted to be shewn that any agreement ever took

(1) 1 Jac. & Walk. 576.

place between the lord and Ledwell, or Mackaness; indeed, no such agreement is alleged. It appears that Ledwell, the surviving life, the surrenderor, died in 1809, and it does not appear that that was known to the lord till 1829; but in 1829, the fact coming to the lord's knowledge that Ledwell, the surrenderor, had died, the lord entered into possession of the premises.

The prayer of the bill is, that the defendant (the lord) may be compelled, by the decree of the Court, to make one or more grant or grants to the plaintiffs, or one of them, for their or his lives or life, or to some other persons or person, by the direction of the plaintiffs, for their or his lives or life, of the premises comprised in the said surrender to John Mackaness, or such other grant or grants of the said premises as John Mackaness was or is, or as the plaintiffs, deriving title through him, were entitled to have made, according to the custom of the said manor,—putting the whole case therefore upon the custom of the manor.

Now Lord Abingdon, in his answer to this bill, denies that there was any such custom as alleged in the bill, or any custom under which the tenant for life had a right to surrender in favour of any other person to be admitted as tenant for life, in his place or for any interest. He puts that point directly in issue upon the pleadings. The cause came on, on the 17th of July 1830, for hearing, without any evidence, when the late Master of the Rolls, Sir John Leach, ordered it to be referred to the Master to inquire whether, according to the custom of the manor, and the effect of the surrender by Ledwell, there remained on the death of Ledwell any and what right and interest in John Mackaness, or any person claiming under him, to demand any and what grant from the lord of the said manor of the copyhold in question. Now undoubtedly that was an inquiry which could only be justified upon there being a custom stated in the pleadings, which would be a good custom at law, on which to support the plaintiffs' title. The Court is always very unwilling, after an inquiry has been had, to disturb a decree, which merely seeks further information; but there must be something in the proceeding, upon which that further informa-

tion can operate; and, if a custom is stated, which cannot support the plaintiff's title, then, beyond all doubt, it is the duty of the Court to decide on the case, as it appears on the pleadings, and not put the parties to the expense of an inquiry which cannot by possibility end in any good result to either of them. The Master made his report in the year 1831, and stating what information he had been able to obtain as to the custom of the manor, he comes to the conclusion that there was no custom; he negatived, in fact, the point which it was the object of the inquiry to elucidate, upon which exceptions were taken by the plaintiffs to the Master's finding, and thereby the plaintiffs "insisted that the Master ought to have stated that, according to the custom of the manor, and the effect of the surrender of the 25th of April 1803, there remained on the death of William E. Ledwell, in John Mackaness, or some person claiming under him, a right to demand a grant from the lord of the copyholds in question in this cause, to hold for such life or lives, estate or interest, estates or interests, as should be agreed upon between the lord and John Mackaness, or otherwise for the life of John Mackaness." Now, that is a very singular proposition to raise upon an exception, there being no evidence nor any allegation of any such agreement having taken place. When that exception came on to be argued, it appeared to the Master of the Rolls that Mackaness, who was out of the jurisdiction, but not proved to be so, was a necessary party, and that the cause could not proceed without his being brought before the Court, or the cause of his absence accounted for. The cause therefore stood over, and a supplemental bill was filed, which resulted in the production of evidence, shewing that Mackaness was out of the jurisdiction; and on the cause coming on again in the year 1832, the exception was allowed.

Now the exception, having been allowed, of course was allowed in the terms in which it is stated, viz. that the lord was bound to make a grant of the copyholds for such life or lives as should be agreed upon between him and Mackaness. Beyond all doubt, if he had come to any agreement between himself and Mackaness, there was no other person had a right to

interfere to prevent him making the grant, but such an exception could never be properly allowed, because it raised no proposition on which the rights of the parties could possibly be adjudicated.

These exceptions having been allowed, the cause was heard for further directions; and then arose the question, which, after all, was the first and vital question to be decided, viz. what was to be the fine? There is no custom stated, nor could any be stated, that the lord was bound to put in any new life the party chose to suggest to him, without any remuneration; that was not pretended: then the question was, what fine was to be paid for substituting Mr. Mackaness's life for Mr. Ledwell's. It appears they were nearly of the same age; but if the lord was bound to put in a new life at all, he was bound to do it whatever the age might be; and that raised a question which, if it had been raised before, would have struck at the propriety of all the proceedings, because the fine was a fine not certain, nor a fine supported by custom: this fact struck at once at the root of the alleged custom. From that time (1832) the parties seem to have been labouring in the Master's office to come to some conclusion as to what should be the fine, nobody contending it was part of the custom that there should be no fine; and then different modes of calculation are resorted to, with reference to the difference of the ages of the two lives, and a variety of other speculations, without any foundation, were resorted to, as to what was reasonable and proper to be assessed as the fine to be paid to the lord for the change of lives. Now it is very strange that any case should have arrived at that state, but such being the state of things, it was singular indeed that it should not at once have occurred to the parties that the prior proceedings could not be accurate.

Now the whole of the proceedings, and the statement of the Master as to the court rolls, by way of custom, shew that there is no custom as to the fine at all; that, although there are instances in which a tenant has surrendered the life estate, and one has been admitted for one or more lives, and that a fine has been paid, it was matter evidently of arrangement between the lord and the in-coming tenant what

that fine should be. There is not only no evidence of the custom, but no case stated as to what the fine payable is.

The case then comes to this: the copyhold tenant for life sets up a custom by which he has a right to surrender his life estate, and call upon the lord to admit another life in his place, there being no custom as to what fine is to be paid on such occasion; that is, no new proposition, no new custom, because, although it was the subject of decision in *Wharton v. King*, it was also the subject of a decision of a much higher authority than the case of *Wharton v. King*, inasmuch as it was decided in *The Duke of Grafton's case* (2), where Lord King directed an issue, to try a custom of renewal similar to the one set up in the present case, and, upon appeal to the House of Lords, the decree of Lord King was reversed, and the bill was dismissed, on the ground that there was no such custom stated as could in law be supported. Then followed Lord Hardwicke's decision in *Lord Abergavenny's case* (3), and then comes *Wharton v. King*, which (acting on those authorities, laying down no new law, but finding the law settled by the highest authority, viz. that of the House of Lords, and followed by the decision of Lord Hardwicke,) finally established, or rather recognized the law as previously established, as to which no question has since been raised, namely, that a custom is not good by which a tenant for life claims a right to surrender his life estate, and to call upon the lord to introduce another life in his place, unless there be a fine certain.

Well, then, this case comes identically within the principle of the two cases I have referred to; and the frame of the pleadings, and the way in which the case is got up by the plaintiffs, is such as to exclude the only argument that could be raised in the face of all those cases, namely, that the lord had, in some way or other, bound himself to admit to some estate or other, John Mackaness, by what is called the acceptance of the surrender. It does not appear that the lord did anything with reference to the surrender. It appears

(2) 2 Bro. P.C. 284.

(3) 3 Anst. 659, n.

that the tenant for life thought proper to surrender into the hands of the steward, and then little more was done till this question arose between those who claim from John Mackaness and the lord.

Now I am quite sure if any such question should be raised as obligatory on the lord, it does not arise in the present case. The case is put entirely upon custom, and the facts elicited by what the Master finds has taken place shew that the custom, according to the facts, is a custom which cannot in law be supported. It does appear to me, therefore, looking at what took place in 1830, and previously to that period, that I am bound to state that the reference of 1830 ought not to have been made, and that all the subsequent proceedings are founded in error, and the whole must be reversed and the bill dismissed, as it ought to have been in 1830; but I cannot dismiss it with costs, because the party who now raises the question has been the means of the heavy expense which has been incurred, by acquiescing in the decree of that year, 1830, up to the present moment, when he ought to have taken a very different course.

L.C. }
Jan. 29. } NORCUTT v. DODD.*

Insolvent Debtors Act—Voluntary Conveyances—Chose in Action—Statute 13 Eliz. c. 5.

A voluntary assignment by a person, who was insolvent at the date thereof, may be set aside by his assignee, appointed at a subsequent period by the Insolvent Debtors Court, although the subject-matter of the assignment was a chose in action.

The bill in this case was filed by the assignee of Robert Torre, appointed under the Insolvent Debtors Act.

It appeared, that in April 1832 a marriage settlement was executed, to which Elizabeth Dodd, the intended wife, the said Robert Torre, W. Dodd, the father of Elizabeth Dodd, and a person of the name of Le Keux, a trustee, were parties.

* This case and the following one were omitted to be inserted in their proper place, by reason of the loss of the MS. papers.

By the settlement, the father of Elizabeth Dodd covenanted with Robert Torre, the intended husband, that after the marriage had been solemnized, he would, during the joint lives of himself and Elizabeth Dodd, pay to Robert Torre 50*l.* per annum in manner therein stated.

The marriage took effect in the same month of April; on the 17th of November 1836, Norcutt, the plaintiff, obtained judgment in an action against Robert Torre for 70*l.*, and the costs of the action. The plaintiff sued out a writ of execution on his judgment a few days afterwards, but when the writ was about to be executed by the officer on the goods of Robert Torre, he found an officer already in possession thereof, under a writ of execution of prior date, at the suit of a person named Mottram. The goods when sold, in January 1837, did not realize sufficient wherewith to satisfy Mottram's debt.

In the month of December 1836, Robert Torre assigned by deed the annuity to Le Keux, for the sole and separate benefit of Elizabeth Torre, the wife, and in or about May 1837, Robert Torre obtained his discharge under the Insolvent Debtors Act, the plaintiff having been appointed his assignee.

The defendants to the bill were the several parties to the settlement, and it sought a declaration of the Court, that the assignment was fraudulent against the plaintiff and insolvent, and creditors generally, and an account and payment of the arrears of the annuity, &c.

Mr. Wakefield and Mr. Kenyon Parker submitted, that the assignment was fraudulent, under the statute 13 Eliz. c. 5, especially when the particular circumstances of the case were taken into consideration—*Taylor v. Jones* (1).

Mr. Rogers, for the wife of Robert Torre, contended, that a voluntary assignment of property was not within the provisions of the act 7 Geo. 4. c. 57, called the Insolvent Debtors Act, and that the act of 13 Eliz. c. 5. had no application whatever to a chose in action—*Dundas v. Dutens* (2), and *Rider v. Kidder* (3).

(1) 2 Atk. 600.

(2) 1 Ves. jun. 196.

(3) 10 Ves. 360.

Mr. Norton, who appeared for the trustee *Le Keux*, and the father *W. Dodd*, said he was ready to act for those parties as the Court might direct.

Mr. Martindale appeared for the insolvent *Robert Torre*.

The LORD CHANCELLOR decided, that although the assignment of a chose in action, (the debtor still living,) was not fraudulent under the act 13 Eliz. c. 5, he was of opinion that such assignment was so, if that act were considered in connexion with the Insolvent Debtors Acts, inasmuch as under the latter acts all the insolvent's property became applicable to the payment of his debts; but as there was no proof in the suit that *Robert Torre* was so extensively indebted as to be insolvent at the date of the assignment, the requisite inquiry on that point must be directed.

The defendants afterwards consented to a decree of the Court, setting aside the subsequent assignment, and the Court directed so much of the costs of the suit of *W. Dodd* and *Le Keux*, as *Robert Torre* should be unable to pay, to be paid out of the payments due from them in respect of the annuity.

L.C. }
Jan. 29. } M'NEIL v. GARRATT.

Injunction—Breach—Committal—Discharge.

A party, who after notice of an injunction having been awarded against him is guilty of a breach of it, may be committed without the writ of injunction being produced.

Mr. Cooke moved for the discharge of the defendant, who had been committed to the custody of an officer of the Court, for breach of an injunction, of which the defendant had been guilty after notice had been given him of the injunction having been awarded against him, but previously to the injunction being drawn up; and contended, that the defendant ought to be discharged, on the authority of *Ellerton v. Thirsk* (1), in which the Lord Chancellor states, that a motion to commit for breach

(1) 1 Jac. & Walk. 376.

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of an injunction could not be supported, unless the writ of injunction be produced at the time the motion is made.

The LORD CHANCELLOR (without calling on *Mr. Stuart* and *Mr. Willcock*, in opposition to the motion,) refused the motion with costs, observing, that he could not believe that Lord Eldon in the case cited, ever laid down the rule insisted on in support of the motion, inasmuch as the writ of injunction only bore date when the order of the Court was passed; and if the rule contended for were correct, a party would have all the time that transpired between the making of an order of the Court, and the passing of it, to commit the very act which the injunction sought to prevent.

L.C. }
April 15, 16. } RAYNE v. BENEDICT.

Practice.—Injunction—Ship and Shipping—Right of Captain of Ship to sell Cargo for purpose of paying for Repairs.

Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before the Court will grant such assistance, the plaintiffs must shew their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at their place of destination, and from all liability on the bills of lading.

In November 1840, the plaintiff shipped certain goods of the value of about 700*l.* on board the ship *Armadillo*, then lying at Newcastle, of which the defendant, *W. A. Benedict*, was the captain, and which he represented to belong to a firm of respectability at New York. The goods were the property of the plaintiff, and were consigned to his agents at New York, for the purpose of being sold for the plaintiff's benefit, and the bill of lading was delivered to the plaintiff, and sent by him to his agents at New York: these circumstances, were however introduced into the bill by amendment. The vessel set sail in No-

2 Q

ember 1840, but in going out of the Tyne met with an accident, and put into South Shields for repairs. When the necessary repairs were completed, she again set sail, but towards the end of February the plaintiff learned, that the vessel was alleged to have sprung a leak, and had put into Cowes harbour. The bill stated, that the firm at New York, to whom the ship was stated to belong, had become insolvent, and that the captain had no means of paying for the necessary repairs, and had threatened and intended to sell the cargo, or part of it, to raise money to pay for the repairs, and that he was landing part of the cargo at Cowes for the purpose of selling it. The bill prayed for an injunction to restrain the defendant from selling the goods; and the amended bill also asked a declaration, that the contract between the plaintiff and defendant was at an end, and that the goods ought to be returned to the plaintiff.

The plaintiff had obtained an *ex parte* injunction from the Vice Chancellor, which his Honour, upon the case being argued before him, dissolved. The plaintiff now moved before the Lord Chancellor, that the order of the Vice Chancellor dissolving the injunction might be discharged.

Mr. Wakefield, Mr. G. Richards, and Mr. Keene, appeared for the plaintiff, and contended, that the captain had no right to sell his cargo in order to repair his vessel, where the owners of the cargo were present, and claimed to have it returned to them; that the reason why a captain was invested with the power of selling part of his cargo in case of need, was not that he might repair his vessel for the benefit of the owners, but that he might be able to perform his contract for the benefit of the shippers of the goods, by delivering them at the place of their destination: but in this case the owners were desirous that the goods should be delivered up to them, and the contract ended.

Mr. Wigram and Mr. Hull, contra, insisted, that the bill only stated that the plaintiff had shipped these goods, but did not state that they absolutely belonged to him; he might have been acting merely as agent for the house at New York: that the plaintiff had incurred a certain debt to the defendant for freight, which he had not offered to pay, nor had he exempted

the captain from his agreement to deliver these goods at New York.

Mr. Wakefield replied.

The following authorities were cited (1):

Wilson v. Millar, 2 Stark. 1.

Dobson v. Wilson, 3 Campb. 480.

THE LORD CHANCELLOR.—As I understood the facts of this case in the first instance, it was that of the owners of the goods shipping their goods on board a ship in the Tyne; that the ship, meeting with an accident, was afterwards repaired at Shields, and then proceeding on her voyage to New York, and having without any assignable cause become leaky, to the extent of making nine inches of water per hour, and going into the harbour of Cowes for repairs; the owners of the goods hearing of this, and not having had the fact communicated to them by the captain, interfere and prohibit the captain from dealing with their goods, for the purpose of raising money to do these repairs; and the injunction is, that the captain may be restrained from selling, hypothecating, or disposing of the cargo for the purpose of paying for the repairs at Cowes, necessary to enable the ship to proceed on her voyage. Under these circumstances, the plaintiff claiming his goods, and being in a situation to demand the return of those goods, would entitle him to the interposition of the Court; because, otherwise, any captain who had a rotten ship at his command, might get goods on board at any port in England, and then sailing to any other port in England, might sell those goods in order to repair his rotten ship, and leave no redress to the owners of the goods. And here it would appear, the owners of the ship were persons who, whatever their credit might have been when the ship sailed from New York, have ceased now to have any credit, and are not now forthcoming to meet any demand against them. But in order to establish that right, it would be incumbent on the plaintiff to shew, in the first instance, that he was so far the owner of the goods, as to have a right to controul the disposition of the goods; and it would be right

(1) See also *Abbott on Shipping*, part 4, ch. 4, and the cases there cited.

for him also to shew, that, having such dominion over the goods, he had so dealt with the captain as to exonerate the captain from the liability to carry the goods to New York; because, although it is perfectly true that the right of the captain to hypothecate the goods is said to be for the benefit of the goods, they being to be carried to the place of destination, the owner cannot come and say, You shall carry those goods to the place of destination, but you shall not deal with them in the way the law enables you to deal with them for the purpose of doing so. It appears to me, that the owner has not relieved the captain from carrying the goods to New York, but is just saying, you shall not use those means the law enables you to use, for the purpose of doing so. There has not been any proposition to reclaim the goods: if there had been, the question would then have remained as to the terms on which that should be done. Now, although the captain has a right to transship, Mr. Wakefield says, he is not *bound* to transship. He is bound to carry the goods to the place of destination: it is contract; and if they are not carried to the place of destination, he or the owners are liable for not performing the part of the contract,—liable to the shipper by virtue of the contract, and liable to the consignee, the bill of lading being delivered to the consignee, by virtue of that bill of lading. If the owners of the goods are present at any place where the accident happens, I have no doubt they have a right, by settling with the captain—whether by paying freight or not, is not now the question—to say, You shall not sell my goods: but they have no right to say to the captain, You shall carry my goods to the place of destination, but you shall not hypothecate or sell part of the goods, for the purpose of enabling you to carry them there. Mr. Wakefield says, you may transship, but that you shall not repair for the purpose of carrying the goods. The power the captain has over the goods is for the purpose, in case of certain contingencies happening, of enabling him to protect the cargo, and to carry his contract into effect. Now I apprehend, in this case, the plaintiff has failed on both grounds. He has not shewn such an interest in these goods, as to entitle him

to exercise dominion over them. Though he has had the opportunity of making an affidavit, he has not shewn any such interest in them, but he has stated that which is not inconsistent with the title being in the consignees altogether. It is quite obvious, it was a very important question in the case, considering what had taken place, which however he did not mention in his affidavit, namely, as to the bill of lading being sent forward. He does not state it, but it is stated in the answer, that the bill of lading is sent forward to the consignee: but the plaintiff is totally silent as to the bill of lading, or there being any consignment to anybody. If there had been a bill of lading, it might have been delivered to the captain, for him to give to any person whom he might select for the purpose of dealing with the goods, if the goods had been the goods of the plaintiff. It is possible, they may be the goods of the plaintiff, and that they may be consigned to this house at New York merely for the purpose of sale; or it may be, that they are the property of the house at New York, and that the parties here have acted merely as the agents of the parties at New York. All that is disclosed upon the subject is from the answer, which states that there was a bill of lading, consigning these goods to be delivered to certain persons in New York, which the captain says he believes had been sent forward to those persons. Those persons therefore, on the arrival of the ship at New York, will be entitled to demand the goods according to the bill of lading, and the captain will be liable to such persons, if he does not deliver them. There is therefore a failure, on the part of the plaintiff, in shewing that he has a dominion over the goods for the purpose of interposing now, and saying, that the goods intended to go by your ship shall no longer perform that voyage, but that I demand again my property. He has no such right: he has not shewn it to be his property: but if he had not been in that situation, he could only have done so upon relieving the captain from the liability to perform the voyage. He is so far from doing that, that he leaves him subject to that liability, and is not now offering to relieve him. He does not de-

mand the goods. He says, I am willing to leave the goods in your hands; I only seek to prevent you from dealing with them in the way the law, without my interposition, if necessary, would enable you to do, so as to perform your voyage. That was the reason which made me ask, whether the injunction which the plaintiffs asked, was to prevent the captain from prosecuting the voyage. It is quite obvious that was not the intention of the plaintiff, otherwise the plaintiff would have made that part of his demand. The only question then would be, whether any thing, and what, was due from the owner of the goods, in respect of that part of the voyage which had been performed; but the injunction, as prayed for, would leave the liability of the captain to perform the voyage untouched. It asks that he may be made liable to that contract, and yet not be at liberty to raise money which may be necessary for the purpose of putting the ship in that state, in which alone it would be able to perform the voyage to New York. I think therefore, upon those two grounds, both necessary to be established in order to entitle the plaintiff to the injunction which he seeks, he cannot, under this state of circumstances, be entitled to the injunction he prays; and that the order of the Vice Chancellor was correct, and must be confirmed; and that the motion must be refused with costs. It would be quite a different thing, if the plaintiff came here proving he was the owner of those goods, and seeking that the captain should not part with them. To be sure, a party who ships goods at Newcastle in November, has not made much progress towards the accomplishment of his views, who finds the goods at Cowes in April. But without giving any opinion upon a motion on a case differently shaped, I am quite clearly of opinion, he is not entitled to the injunction he now asks.

The plaintiff afterwards amended his bill, stating that the goods shipped by him were his exclusive property, and were shipped by him for the purpose of being sold at New York on his own account. On the 4th of May, the plaintiff applied to the Vice Chancellor for an injunction, which his Honour refused; and the

plaintiff then made a similar application to the Lord Chancellor on the 7th of May, but his Lordship said, that it did not appear that the plaintiff had relieved the defendant from the liabilities to which he would be subject, on his arrival at New York, under his bill of lading; and that although it was a hard case upon the plaintiff, still he must refuse the application, with costs.

L.C. }
April 17. } BEATTIE v. JOHNSTONE.

Infant—Guardians, Appointment of.

A, a domiciled Scotchman, executed an instrument in the Scotch form, by which he appointed eight persons tutors and curators of his only child. Four of these persons accepted this office. After the death of A. and his wife, a bill was filed for the appointment of guardians and maintenance. The infant had no property in this country, but the four tutors and curators appeared to the bill:—Held, that the tutors and curators were not to be considered as testamentary guardians in this country; that the matter being disputed, guardians ought not to be appointed without a reference to the Master; that the Court would be disposed to appoint the four tutors to be guardians, but, as they all resided in Scotland, would add other guardians to them: and that, as the tutors had appeared to the bill, the circumstance that the child had no property in this country would not exclude the jurisdiction of the Court.

Thomas Beattie, who was a domiciled Scotchman, executed a deed in the Scotch form, dated the 3rd of October 1835, by which he appointed his wife, together with J. J. H. Johnstone, James H. Stewart, G. G. Bell, and William Stewart, and four other gentlemen who did not act, to be the tutors and curators of his children, with power to grant leases, and to do every other act and deed in the management of the affairs of his said children, competent to tutors and curators by the law of Scotland.

Mr. Beattie went shortly afterwards, with his wife and daughter, to Madeira, where he died in April 1836, leaving one daughter only, then aged two years. Mrs. Beattie

then returned with her daughter to Scotland, where they remained a very short period, and from that time lived in England till the death of Mrs. Beattie, which occurred in December 1840.

Mrs. Beattie made her will shortly before her death, by which she expressed her wish, that her daughter should be brought up by its maternal grandfather, Duncan Stewart, and Mrs. Buchanan, an aunt of Mrs. Beattie. The infant was tenant in tail in possession of some estates in Scotland, worth 2,300*l.* per annum, subject to a mortgage debt of 13,000*l.*

This bill was filed in the name of the infant, by the grandfather, against the tutors and curators, and the executrix of Mrs. Beattie. The object of the bill was, to make the infant a ward of court, and it prayed that her grandfather and aunt might be appointed guardians, and for accounts of the rents and profits of the Scotch estates, and what was due from the executrix of her mother, on account of the allowance which had been paid for the infant's maintenance.

On the 6th of January 1841, the Vice Chancellor made an order appointing Mr. Duncan Stewart and Mrs. Elizabeth Buchanan guardians of the infant.

The four curators presented a petition for a discharge of this order, and by another order of the Vice Chancellor of the 19th of March 1841, the order of January was discharged, and the four curators were appointed guardians, without prejudice to the question, whether by the instrument of the 3rd of October 1835, they were testamentary guardians under the act of 12 Car. 2. c. 24.

The infant presented a petition to the Lord Chancellor, praying that this last-mentioned order might be discharged.

It appeared, that the four tutors and curators resided in Scotland, but came to England occasionally, and that one of them, being a member of parliament, usually resided in London during the session of parliament.

Mr. Jacob, Mr. Wigram, and Mr. S. Follett, for the infant plaintiff, insisted, that the order of the Vice Chancellor was erroneous, as all the guardians were out of the jurisdiction of the Court, and as there was no reference to the Master; and that

it excluded four of the parties who were named by the father;—that the duties of tutors and curators were strictly defined by the law of Scotland, and the Court of Session in Scotland required an exact performance of those duties.

Mr. K. Bruce, Mr. G. Richards, and Mr. Romilly, for the curators, contended, that a reference to the Master for the appointment of guardians was frequently dispensed with; that it was questionable whether these parties were not entitled to the guardianship of the child under the statute of Charles II. (12 Car. 2. c. 24. s. 8.) and that the case was not one in which there was any occasion for the interference of the Court, as the infant was a Scotch child, with no property except in Scotland, and had guardians appointed in such a manner as the law of Scotland required.

Wellesley v. Duke of Beaufort, 2 Russ. 20; s. c. 5 Law J. Rep. Chanc. 85.

Peckham v. Peckham, 2 Cox, 46.

Chatteris v. Young, 1 Jac. & Walk. 106.

Campbell v. Mackay, 2 Myl. & Cr. 32; s. c. 6 Law J. Rep. (N.S.) Chanc. 73.

Logan v. Fairlie, Jac. 193; s. c. 3 Law J. Rep. Chanc. 152.

The LORD CHANCELLOR said, that a reference to the Master was necessary, before guardians could be appointed, where the appointment was a matter of contest; that the Court was in this case without information on many important points, and had no means of obtaining it. The first appointment by the Vice Chancellor was improper; if the immediate interposition of the Court was necessary, there should have been an immediate reference to the Master; but the first order was obviously wrong, and it was afterwards discharged: by that order the grandfather and the grand-aunt were appointed guardians; then came four out of the eight persons who were named in the deed, and claimed to be testamentary guardians: if their claim was right, a different view was thus presented to the Court; and the next order was erroneous which appointed them guardians, because the Court then would have no jurisdiction. His Lordship could not however consider them as testamentary guardians. The father executed a deed, in which if there was any intention clearly expressed, to appoint

these persons as guardians, that intention would prevail; but he intrusts them to take care of the property, and appoints them to an office which is well known in Scotland, but is not known in England: they were to take care of the Scotch estates, as tutors and curators, an office very different from that of guardians in England. Looking at the whole instrument, his Lordship thought the intention of the father was, to provide for his family as residing in Scotland. But with respect to the appointment of guardians, the four curators all resided in Scotland, one of them frequently residing in England, to attend to his duties as a member of parliament; but the Court would not appoint as guardians persons who were generally out of England. But as the estates were in Scotland, and as these gentlemen were selected by the father, he thought it would be desirable for the parties to consent to the appointment of these gentlemen, jointly with the grandfather and the grand-aunt: and if this suggestion was acted upon, his Lordship would make the usual order of reference to the Master, and direct him to inquire what was the fortune of the child, and to approve of a scheme for her education.

V.C. }
April 28. } BISHOP v. BISHOP.

Dower—Timber.

If timber be cut down upon estates, of which a widow is dowable, before her dower is set out by metes and bounds, the dowress is entitled during her estate to the income arising from one-third of the fund produced by the sale of the severed timber.

The plaintiff was the heir-at-law of — Bishop, deceased, and the defendant was the widow, and as such was found to be dowable of certain estates which belonged to her late husband. By an order made in the cause, certain timber growing upon the estate had been cut down and sold; and it became a question, whether the widow was, or was not, entitled to receive for her life one-third of the dividends of the fund produced by the sale of the timber.

Mr. Chandless, for the plaintiff.—The timber has been properly cut, being done under the order of the Court, and therefore the plaintiff is not in such a position as would induce the Court to exclude him from any benefit arising from the severance of the timber, to which as heir he is legally entitled. There is no equity for the widow to obtain any benefit in respect of her right to dower, which she would not have at law. Now, at law the widow would not be entitled to any specific part of the estate, until it had been set out by metes and bounds: that has never been done. It would seem to follow, that it is impossible to declare the widow entitled to any portion of this fund.

Mr. Purvis, for the defendant, the widow.

The VICE CHANCELLOR.—The heir could not have any right as against the dowress to denude the estate of the timber. Her estate is an estate for life, impeachable for waste; and in this respect she must have the same right as another tenant for life impeachable for waste. I think the defendant is entitled to one-third of the income of the money produced by the sale of the timber from the estates of which she is dowable.

M.R. }
May 6. } SIDEBOTHAM v. BARRINGTON.

Bremer v. Broadwood 52 L.R. 136
Agreement—Specific Performance—Removal of Defect of Title after Institution of Suit.

A, after taking the benefit of the Insolvent Debtors Act, became bankrupt. The assignee under the bankruptcy contracted to sell part of the bankrupt's estates, and filed a bill for the specific performance of the contract:—Held, that, under the circumstances, the concurrence of the assignee under the insolvency was necessary to make a good title; and that this was an objection to the title, and not merely a question of conveyance.

The title being declared bad, and the cause set down for further directions, the plaintiff presented a petition, offering to obtain the concurrence of the assignee under the insolvency, and asking for a reference, whether a good title could then be made:—The Court made the order upon further directions and the petition.

This suit was instituted by the assignee of William Barrington, a bankrupt, to compel the specific performance of an agreement, entered into by the defendant for the purchase of part of the bankrupt's estate.

In the early part of 1829, the bankrupt committed an act of bankruptcy. In April 1829, he executed a mortgage of certain estates for a term of ninety-nine years; and on the 21st of the same month of April, he executed a voluntary conveyance of the mortgaged estate to a trustee, upon trust, to sell and pay certain creditors, who were named in the deed, but were not parties to it.

In December 1829, the bankrupt was arrested for debt; and in April 1830, he was discharged from prison, under the Insolvent Debtors Act. On the 22nd of February 1833, a fiat in bankruptcy was issued against him; and the plaintiff was chosen assignee. On the 30th of May 1833, the plaintiff entered into an agreement for the sale of part of the bankrupt's estate to the defendant, who was a son of the bankrupt. The defendant raised several objections to the title, and insisted that a good title could not be deduced without the concurrence of the assignee under the insolvency. It was also contended, that the assignment of April 1829 was void, as against the assignee under the fiat, in consequence of the prior act of bankruptcy, but was good as against the assignee under the insolvency; and that the plaintiff could, therefore, exercise the power of sale which was given to the trustee, named in the deed of April 1829. An attempt had been unsuccessfully made to supersede the bankruptcy—*Ex parte Barrington* (1).

The usual reference had been ordered to the Master, to inquire whether a good title could be made; and the Master, by his report, in June 1840, found that a good title could not be made.

The plaintiff excepted to the report, and the exceptions were heard before the Master of the Rolls, in February 1840, and were overruled. The plaintiff presented a petition, praying, that on the plaintiff's procuring the assignee under the insol-

vency to join in the conveyance to the defendant, or as he should direct, which the plaintiff undertook to do, the defendant might be ordered to perform his agreement; or that it might be referred back to the Master to inquire, whether a good title could *now* be made. The cause was set down for further directions, and now came on with the petition.

Mr. Pemberton and *Mr. Teed* appeared for the plaintiff; and

Mr. Kindersley, *Mr. Bethell*, and *Mr. Rudall*, contra.

The following authorities were referred to, upon the different occasions, when this cause was before the Court.

Leckmere v. Brasier, 2 Jac. & Walk. 287.

Mather v. Priestman, 9 Sim. 352; s. c.

7 Law J. Rep. (N.S.) Chanc. 258.

7 Geo. 4. c. 57. ss. 13, 32.

Lord Braybrooke v. Inskip, 8 Ves. 417.

THE MASTER OF THE ROLLS.—The only doubt I have is about the terms of the order. I certainly think, *Mr. Teed*, you are entitled to relief here. As to the costs of the suit, that is quite another consideration. What you may have to pay, what errors you have committed, and what are the consequences, is quite another consideration. But it appears, under the circumstances now, that you can make a good title. Ought I to declare that? I think I ought to hesitate a little. The question discussed before me was, whether the want of the concurrence of the assignee in the insolvency was an objection to the title, or an objection to the conveyance. I considered it to be then, and I think it now, an objection to the title.

Well, then, the cause being on for further directions, it is represented to me that you can now make a good title, by the concurrence of the same person whose want of concurrence was the defect of the title before, and I think it rests on that only; that is the substance of it. It is suggested, that something more than the concurrence of this assignee in the insolvency is required. The question is, whether I ought not to assume, in this case, that the assignee in the insolvency can do and will do his duty. He has offered to do this. If the objection were, that there was not proof of his having offered, I would

(1) 1 Dea. 3.

have it stand over for inquiry. But supposing it to be clear that the assignee offered to join in the conveyance, the parties having admitted, before the Master, there are assets arising from this purchase sufficient to pay all the debts under the insolvency, I think I have ground for supposing he will do his duty when he joins in the conveyance, and that he would not offer to do it, unless he could procure the authority of those who would enable him to do it.

But it is important not to have any further delay, and therefore I think I ought to have not only the undertaking that it shall be done, but that it shall be done within a limited time; and if there is any question, whether this offer will not, together with the other circumstances, make a good title, then I think it is not the first part, but the second part of the prayer that ought to be granted, whether this, taken with the circumstances formerly proved before the Master, will make a good title. In either view, you cannot be satisfied, Mr. Kindersley, I know; but if the parties desire to have this matter further investigated, then I will refer it to the Master to inquire, whether the concurrence of the assignee of the insolvency, together with the other facts, enable this vendor to make a good title. If further investigation is not required, then I must say, this does make a good title, and it would be equally open to you to object in either case.

His Lordship ordered, that it should be referred back to the Master to inquire whether, with the concurrence of the assignee under the insolvency, and the facts already proved before the Master, the plaintiff could make a good title; and that the consideration of further directions and costs should stand over.

M.R. }
May 7. } CURRIE v. GOULD.

Will—Legacy—Construction.

A legacy was bequeathed to A, which in case of her death was to devolve to her children, with a gift over in the event of their being also dead at her decease:—Held, that the legacy was to be paid to A's children

living at her decease, and that her children who died in her lifetime, took no interest in the legacy.

William Burrell, by his will, dated the 19th of July 1791, bequeathed as follows: "To my sister Ann, the wife of Thomas Currie, the sum of 500*l.* sterling, which sum in case of her death, either before or after me, is to devolve to her child or children, or in the event of their being also dead at her decease, the balance, after paying Thomas Currie, her husband, 50*l.*, to become the property of my daughter Ann." The testator died shortly afterward.

Ann Currie died in 1837, leaving one child only her surviving. She had had two other children, who died in her lifetime, and a question was now raised, whether the legacy of 500*l.* ought to be equally divided among the three children of Ann Currie, or whether the surviving child was entitled to the whole sum.

Mr. Moore insisted, that the surviving child ought to have the whole fund either as survivor, if there was a joint tenancy among the children, or as being the only child living at the death of Ann Currie. He cited

Campbell v. Campbell, 4 Bro. C.C. 15.

Mr. G. Turner, contra, contended, that as the gift over was not to take effect, except all the children of Ann Currie were dead at the time of her decease, the interests which the children took under the original bequest were not affected by it; and that as the children would become entitled to a share at their respective births, their interests would commence at different times, and therefore they would take as tenants in common.

Woodgate v. Unwin, 4 Sim. 129.

Sturgess v. Pearson, 4 Mad. 411.

Mr. Campbell and Mr. Stevens appeared for other parties.

THE MASTER OF THE ROLLS.—I think the bequest was intended for the benefit of the children who were living at the death of the mother.

V.C.
 Feb. 26, 27; }
 Mar. 1; April 15. } WILSON v. BEDDARD.

Issue Devisavit vel non—New Trial.

After an issue devisavit vel non, and a verdict affirming the validity of the will, it is not the rule of the court to direct another issue on the same question, on the application of the heir-at-law, unless, upon consideration of the circumstances, the case appears to be one in which another trial ought to be had, before making a decree which would bind the inheritance.

On a bill filed against the trustees and persons interested, to establish a will and carry the trusts into execution, a decree was made, directing the trial of an issue *devisavit vel non*.

The trial took place at the Stafford Summer Assizes, in 1840, before Parke, B., when a verdict was found for the plaintiff, against the defendant Williams, who claimed under the heiress-at-law. The facts are more minutely stated in the Vice Chancellor's judgment.

The defendant now moved for a new trial.

Mr. K. Bruce and Mr. Bethell, for the motion.—On a bill to establish a will of land, and bind the inheritance, it is almost of course, on the application of the heir-at-law, to direct a second trial. The Court looks to the fact that, at law, the heir might bring successive ejectments, and will not conclude him by the result of one issue.

Lord Darlington v. Bos, 1 Eden, 270.

Sherborne v. Naper, 2 Kdg. P.C. 252.

Mathews v. Warner, 4 Ves. 206.

Pemberton v. Pemberton, 13 Ves. 290.

Winchelsea v. Wauchope, 3 Russ. 445;

s. c. 5 Law J. Rep. Chanc. 167.

Tatham v. Wright, 2 Russ. & Myl. 8.

Slaney v. Wade, 1 M. & Cr. 353.

Locke v. Colman, 2 Ibid, 44.

Gibbs v. Hooper, 2 M. & K. 353.

Cleeve v. Gascoigne, Amb. 324.

Stace v. Mabbot, 2 Ves. sen. 553.

Edwin v. Thomas, 2 Vern. 75.

The Attorney General v. Montgomery,

2 Atk. 378, Prac. Reg. p. 263.

Warden, &c. of St. Paul's v. Morris,

9 Ves. 169.

NEW SERIES, X.—CHANC.

Mr. Serj. Talfourd, Mr. Jacob, and Mr. Armstrong, for the plaintiff.—There is no rule by which this Court is bound to direct a new trial, on the application of the heir. It is a matter purely of discretion, and is refused, unless the Court thinks that more light ought to be thrown on the fact in issue—*White v. Wilson* (1).

Mr. K. Bruce, in reply.

April 15.—The VICE CHANCELLOR.—This case came on before me, on motion for a new trial. It appears that a person of the name of J. P. Wilson made a will, or is said to have made a will, dated the 7th of September 1826; and that he died the following day; leaving his sister Mary, the wife of R. Williams, his heiress-at-law. It appears that the will was made the day before the party died, and when he was extremely ill. There were three witnesses to the will, Mr. Wood, an attorney, who made the will, a boy Durant, fourteen years of age, and a person of the name of Noke. The will, on the face of it, is signed by the testator's mark, and not his name. The nature of the will was this: with respect to the real estate in question, there was a devise to a son of Mary Williams, who was the testator's nephew, in fee, with an executory devise over in case he died before twenty-five; and if, after twenty-five, he died without issue, there was a devise over to the plaintiff in equity; and there was a direction in the will, that until the younger Williams attained twenty-five, the land should be let to Mr. Wilson, at a rent of 300*l.* a year. The Messrs. Beddard, who were the trustees, were to have the making of the lease to Wilson. It appears, that on the 2nd of October 1825, some agreement was made between the parties, by which Williams was to have a lease of some portion of the estate for 87*l.* a year. It appears that Mrs. Williams, the heiress-at-law of the deceased, was in his house when the will was made, and there was no dispute whatever about it, so long as the younger Williams was alive. There is no distinct evidence of the time of his death; but it appears that he died in May 1830. In the year 1831 this bill was filed by Mr. Wilson, to establish the

(1) 13 Ves. 87.

will. When the cause was at issue, witnesses were examined for the purpose of proving the will; and, of course, the attesting witnesses to the will were examined. Mr. Wood gave his evidence in favour of the will; Durant gave evidence that he did not think the testator competent to make a will; and Noke stated to the same effect. The Court did not, however, hear anything of the nature of the will. The only order that could be taken was, the order directing an issue *devisavit vel non*. The matter was tried before Parke, B., at the last Summer Assizes at Stafford, and the jury found in favour of the will. A motion was made before me for a new trial; and it was said, in the first place, that in a case where the inheritance is concerned, and a bill is filed to establish a will, it is almost a matter of course, when there is a verdict in favour of the will, whether the Court is satisfied or not, to direct a second trial. It is said, in the second place, that in this case there was a misdirection by the Judge, with respect to what he said regarding the acquiescence of the heiress-at-law. And, in the third place, it is insisted that the law laid down by the Judge, that the signature of a testator is good, where the testator's hand is guided by another person, was wrong. With regard to the first point, I think there is no foundation for it. In the earlier cases there was a stiffness, if I may so speak, in favour of the heir, which the modern cases have not preserved. In the case of *White v. Wilson*, no such principle was observed. All I recollect is, that the Lord Chancellor of that day said, that he should be sorry to apply the rule, that there must be a second trial, whether the Court is satisfied with the first verdict or not. Reference was made to something said by Lord Eldon, in *Pemberton v. Pemberton*. I do not understand that Lord Eldon meant to say, that the Court, on an application for a new trial, is not to consider all the circumstances of the case. I understand, from what the Lord Chancellor laid down in *Lock v. Colman*, that the Court must look at the circumstances. I am not blindly to direct a new trial, because it is asked by the heir-at-law, but I must look at all the circumstances of the case.

It seems, that at the trial the learned

Judge, in his charge to the jury, in alluding to the circumstance that the will was not disputed by Williams or his wife until after the death of their son, said, "their conduct in that respect is a circumstance for you to take into your consideration. Though the conduct of Mr. Williams does not bind the defendant at all, the conduct of Mrs. Williams affects him, because he claims under her. To what weight you consider that conduct entitled, is a matter for you to decide." This is objected to, as being an inaccurate statement of the law; but if this is not quite correct, it appears to me, that what the learned Judge might have said, with respect to the conduct of the parties, would have been vastly stronger than what fell from him. I admit there was nothing done by which a feme covert, during coverture, could affect those claiming the inheritance from her. But what, in the case of Mr. Williams, is the view which the law takes, where the husband and wife are seised in fee in right of the wife, the whole inheritance not being in the husband for all purposes, but for some? It appears that the estate was conveyed, in 1834, by a conveyance equivalent to a fine, to the use of Williams for life, with remainder to his wife for life, with remainder to him in fee. The Judge might have said to the jury, that inasmuch as Mr. Williams, with his wife, was seised in fee in her right, anything he did, as well as said, would be evidence against any person claiming under him and her. The question is not agitated by persons claiming under her only, but claiming under him and her. It appears to me that the Judge might have put the case still more forcibly to the jury by stating the fact, that the husband of the heiress-at-law, who had the inheritance cast upon him, did to a certain extent acquiesce in the will, by taking a beneficial lease from the devisee, claiming under the will. It appears to me, that I am bound to consider not only what effect might have been produced on the minds of the jury, but what would have been produced if the case had been stated, as I think it might, consistently with the law, have been stated to them. According to the Judge's note, it appears that not only was this lease not mentioned, but all declarations made by the husband before

the year 1834 were excluded. My opinion is, that the defendant is affected by what Williams did, as well as what he said, at the time when, according to the defendant's case, Williams alone was entitled to be in possession; and yet the defendant had the advantage of having the sayings and doings of Williams excluded. For the purpose of determining whether there is to be a new trial, I may look not only at the facts which were presented to the jury, but at those which might have been, and were not presented to them.

It was then argued, that the observations of the learned Judge, with reference to the testator's hand being guided by another person, were not law. The Judge said, "It was necessary that the will should be signed by the testator, not with his name, for a mark was sufficient, if put there by his hand, though that hand might be guided by another." Now, the Statute of Frauds requires that the will shall be in writing, and signed by the party devising, or by some other person in his presence, and by his direction. I should like to know whether, if a dumb man, who could not write, should have his hand guided, that would not be sufficient? To constitute a direction, it is not necessary anything should be said. The testator makes his mark himself, or, if he adopts as his act what is done by another, it becomes his own as much as if he made his mark himself. It is observable, on the evidence with respect to the mark, that before the mark that was last put was made, there were faint marks made by the testator on each of the two sheets. The observations on this point may not indeed be of much value; but they appear to me, so far as they went, to be perfectly consonant with the law, and they therefore afford no ground for directing a new trial.

With respect to the evidence of the attesting witnesses, it appears that both Durant and Noke died before the trial at law, and could not be examined, but their depositions were laid before the jury. I have myself always thought, if any attention is to be given to the testimony of witnesses, who deny the solemn act they have themselves attested, it should be the least that is possible; and perhaps it ought to be wholly disregarded.

[His Honour then commented on the depositions of the two attesting witnesses. His Honour also read and remarked upon certain affidavits which had been filed in support of the motion, with reference to alleged conduct and declarations of some of the witnesses at the trial, calculated to impeach the testimony they then gave; and also read the affidavits denying the imputed conduct and declarations; and concluded, that the imputations had not been established.]

If the case had been brought forward merely upon the rule which has been insisted upon, that the heir has a right to ask for a second trial, I should have refused this application without costs; but considering the statements made upon the affidavits, imputing such serious misconduct to the witnesses, and which statements have not been substantiated, I shall refuse the motion, with costs.

V.C.
 July 6, 10;
 Dec. 12, 14, 1840. } DUNCAN v. CHAMBER-
 April 30, 1841. } LAYNE.

Assurance—Assignment—Notice.

By the constitution of the Equitable Life Assurance Society, the assured and assurers are partners. A. effected an insurance on his own life with that society, and assigned the policy to B, in 1827, as security for a debt. A. became insolvent in 1828, and took the benefit of the act, and assigned all his estate and effects to C, the assignee under the insolvency. B. continued to pay the premiums, and kept the policy on foot, until 1838, when he filed his bill against C, for payment of the debt, interest, premiums, and costs:—Held, that notice to the Equitable Society, further than the constructive notice arising from the assured being a partner in the society, was not necessary, to complete the title of B, under the first assignment.

In June 1822, J. W. Bromfield effected an insurance on his life, with the Equitable Assurance Society, for the sum of 1,000*l.* In September 1827, one Skillman borrowed a sum of 250*l.* of the plaintiff

Duncan, as a security for which Skillman gave his warrant of attorney, and Bromfield assigned the policy of insurance, with a proviso for its redemption, on repayment of the 250*l.* and interest. No express notice of the assignment was given to the Equitable Society. In January, 1828, Bromfield, being then a prisoner for debt, took the benefit of the Insolvent Act, and the defendant Chamberlayne was chosen his assignee. The plaintiff, from the time of the assignment of the policy to him, paid the annual premiums of 26*l.* 2*s.*, which, at the time of filing the bill, amounted to 287*l.* Skillman being unable to repay the loan, the plaintiff filed his bill in January 1838, against Chamberlayne, praying that an account might be taken of the amount due, in respect of the debt and interest, and the premiums paid, and costs, and that the same might be paid by Chamberlayne, or the policy foreclosed or sold.

Upon the cause coming on for hearing, it was objected that the plaintiff, the mortgagee, had not completed his title to the policy at the time of the insolvency of the assignor, by giving notice of the assignment to the insurers. It was thereupon referred to the Master, to inquire whether any notice was given to the Equitable Assurance Society, by the plaintiff, of the assignment of the policy; and, if so, when such notice was first given; and to state special circumstances. The Master found and reported, that notice was given to the Equitable Assurance Office of the assignment of the said policy of assurance, by the plaintiff, and that such notice was first given a short time before the 28th of May 1830.

Mr. K. Bruce and Mr. Dixon, for the plaintiff, argued, that he had clearly a lien upon the policy, which entitled him to the relief which he asked, in respect of the premiums he had paid since the insolvency; and that he was also entitled to the policy, as a security for his debt, independently of such subsequently paid premiums—*Bozon v. Bolland*.

Mr. T. Parker, for the defendant Chamberlayne, cited—

Williams v. Thorp, 2 Sim. 257.

Ex parte Tennyson, Mont. & Bli. 67.

July 9.—The VICE CHANCELLOR.—I have caused the registrar's book to be referred to for the case *Bozon v. Bolland* (1). The petition, in the case in which *Bozon v. Bolland* was cited, alleged that neither of the insurance offices there mentioned, required or had any regard to notices of the assignment of policies effected with them; and it stated that, "if such notice be given, the same is not in any manner entered or recorded by the said offices, or either of them." The question was, of the reputed ownership of a policy by the bankrupt, in consequence of no notice of the assignment before the bankruptcy having been given by the creditor to the Insurance Office. In support of the petition the case of *Bozon v. Bolland* was mentioned; but it is not correctly stated in the report. The circumstances of that case were these:—Joshua Rowe sold an annuity to one Howden, which was secured by bond and warrant of attorney. There was no covenant by Rowe to effect an insurance, as stated in the report, but Howden wished to have an insurance on Rowe's life. Creed, as Howden's agent, by mistake took the policy in his own name, without stating that he took it as agent of Howden, who had an interest in Rowe's life. At the end of the year, Creed discovered the mistake, and that the policy was void; and he requested Rowe to assure his own life at his (Creed's) expense, and assign the policy. Rowe agreed to do this, on condition that Creed should pay the premiums until Rowe should repurchase the annuity. On the statement of the case to the Equitable Society, they made no further inquiry, but acted on the former information, and granted a new policy, dated the 23rd of July 1814, to Rowe, at Creed's expense, considering it as merely a substitution for the first; and by deed of the 11th of October 1815, between Rowe and Creed, Rowe assigned the policy to Creed, upon trust for Rowe, if Rowe should repurchase the annuity in his lifetime, according to the condition of the annuity bond; but if he should not so repurchase it, then upon trust for the persons entitled by, from, or under Howden; and Creed covenanted to keep up the policy during Rowe's life, or

(1) Reg. Lib. A. 1831, fol. 3,155.

until the repurchase of the annuity. Rowe did not repurchase the annuity; and he became bankrupt in 1824, and died in 1828. Creed kept the policy on foot; and it was ultimately assigned to Bozon. Bozon filed his bill in 1828, and the cause came on to be heard before the Master of the Rolls, and a decree was made. It was afterwards discovered that there was a defect of parties in the original cause, and that defect was attempted to be cured by arrangement, to which the assignees of the bankrupt would not assent. A supplemental bill was then filed, bringing the assignees of Rowe before the Court. They insisted that the policy was, at the time of the bankruptcy, in the order and disposition of the bankrupt. It was proved that the policy never was in Rowe's possession, and never was intended for his benefit, and that he was merely a trustee of the policy, to secure the annuity to Howden. On that, the Master of the Rolls held,—and held most justly,—that the policy was not in the order and disposition of Rowe at the time he became bankrupt. Nothing turned upon notice to the Equitable Society; but this came out in the course of the inquiry, that prior to the year 1824, the Equitable Assurance Society took no notice of assignments, but paid the amount due on the policy to the person in manual possession of it; and that since that time they have taken notice of assignments of policies, and that a book has been opened at their office for that purpose. The case of *Bozon v. Bolland* is nothing more than this: that, under the circumstances, Bozon held the policy as trustee for Howden. That case has no application to the question of notice, in the cases which were cited. I see nothing to make me alter my opinion in *Williams v. Thorp*. All that can be done at present is to send the case back to the Master. I must take the inquiry to be material; and it is impossible to proceed upon the report, unless some definite meaning can be given to the words "a short time before the 28th of May 1830." That may mean before the insolvency of Bromfield.

Dec. 12.—The case was again mentioned with reference to the form of inquiry which should be directed.

Mr. K. Bruce and Mr. Dixon, for the plaintiff.—The case has two peculiarities. The assignment of a policy of life insurance cannot, from its nature, require notice to the assurers, as the assignment of a trust fund. The assurers cannot, nor can any other party, be prejudiced by the want of notice until the death of the person whose life is insured, for it is not until then that the money becomes payable; it cannot therefore be in the order and disposition of the assignor until that time. Secondly, if notice were necessary, the question is, whether that notice was not in fact given in this case. That may depend on the nature of the contract as between the assurers themselves. If all the members of the society, or the entire funds of the society, are liable to pay the sum insured, the effect may be, that the insurers and the insured are partners; and in that case, notice to one partner being notice to all, it was impossible to deal with the policy by assigning it, without constructive notice to the whole partnership or society.

Mr. T. Parker, contra.

Dec. 14.—The VICE CHANCELLOR ordered that it should be referred to the Master to inquire whether, according to the constitution of the Equitable Society, the assurer in that society is a partner with the assured.

April 30.—The Master having found, and stated by his report, that by the constitution of the Equitable Society, the assurers are partners with the assured in that society, the cause was brought on upon this report.

The VICE CHANCELLOR.—This point was not taken in *Williams v. Thorp*, nor does it seem to have been taken when this case was first before the Court. It appears to me that the effect of all persons insuring being thereby partners in the society, is to make the fact of the assignment of the policy by the assured, a fact which the other partners must be taken to have known.

Decree an account of what was due on the mortgage (2).

(2) The defendant admitted the amount due, and the same exceeding the value of the policy, he

V.C.
 Jan. 16, 25; }
 April 15. } HOUGHTON v. HOUGHTON.

Partnership—Real Estate purchased and used for Partnership Purposes.

A. and B, brothers, in partnership, bought freehold premises, a moiety of which was conveyed to each of them in fee, and the same premises were ever afterwards used in their trade. A. died intestate, leaving B. his heir-at-law. The premises were then in mortgage to their father, and upon the death of the father, and B. entering into partnership with C, another brother, in the same trade, B. and C. paid off the mortgage, and the devisees of the father executed an indenture, conveying the premises to B. and C. as joint tenants in fee. This indenture was not executed by B. or C. B. died intestate, and his heir-at-law filed his bill against C, the surviving partner, and the personal representatives of A. and B, praying a conveyance of the premises to him (the heir of B.) in fee, and the payment of one moiety of the mortgage money out of the personal estate of A, and the other out of the personal estate of B:—Held, that the premises must be regarded as personal estate, and the bill dismissed with costs.

William and James Houghton, who were brothers, and partners in the business of soap-boilers, at Liverpool, in March 1816, agreed with W. M'Iver for the purchase of a piece of land for 800*l.*; and by indenture, dated the 16th of March, premises were, in consideration of that sum expressed to be paid by James Houghton and William Houghton, conveyed to them, their heirs and assigns; *habendum*, as to one equal undivided half part or share thereof, unto the said James, his heirs and assigns, to such uses as he should, by any act, or any deed or will executed as therein mentioned, appoint; and in default of appointment, and in the meantime, to the use of James and his assigns for his natural life, remainder to the use of William, during the life of James, in trust for James; remainder to the use of James, his heirs and assigns for ever: and as to the other equal

did not require a sale; and a declaration was taken, that the plaintiff was absolutely entitled to the policy.—July 24, 1841.

undivided half part or share, unto the said William, his heirs and assigns, to such uses as he should appoint as aforesaid; remainder to James, during the life of William, in trust for William; remainder to William, his heirs, and assigns for ever. William and James Houghton borrowed the 800*l.* from their father James Houghton, the elder; and by a deed, dated the 19th of the same month of March, they conveyed the premises to him by way of mortgage in fee, to secure that sum and interest. William, one of the partners, died in June 1825, intestate, leaving James, his partner, who was also his eldest brother and heir-at-law, surviving. James Houghton, the elder, the father, died in July 1827, having by his will given all his real and personal estate to and amongst his five other children, John, Thomas, Alice, Catherine, and Mary, and appointed them his executors and executrixes. Thomas and Alice proved the will. And by an indenture of the 14th of May 1831, between Thomas, Alice, Catherine, and Margaret, of the one part, and James and John of the other part, reciting the purchase deeds, the death of William, and the will and death of James Houghton, the father, and that James and John had agreed with the parties of the other part to pay to them 640*l.* in full discharge of their shares of the principal and interest of the mortgage debt of 800*l.*, the said parties conveyed the premises to James and John, their heirs and assigns. The parties of the first part executed the deed, but James and John did not execute it; and the bill alleged, that James did not acquiesce in it. James and John after this time entered into partnership together in the said business of soap-boilers, and the business continued to be carried on upon the same premises, until the death of James, intestate, which happened in October 1834. The legal estate in the entirety of the premises then became vested in John Houghton. The bill was filed on behalf of the infant son and heir-at-law of James Houghton, the intestate, against Alice, who it was stated had taken out letters of administration, and become the personal representative of William, and also against John, Thomas, and Susannah Houghton, the widow of James; and prayed an account of what was due on the mortgage, and an account of

the estate of William, possessed by James Houghton, the father, and by Thomas and Alice, the representatives of the father; and that a moiety of the mortgage debt might be paid thereout; and an account of the personal estate of James, the son, possessed by his widow and administratrix, and that the other moiety of the mortgage debt might be paid thereout, and that John might be decreed to convey the premises to the plaintiff.

Mr. Jacob and *Mr. Koe*, for the bill, cited—

Cookson v. Cookson, 8 Sim. 529; s. c. 6 Law J. Rep. (n.s.) Chanc. 337.

Thornton v. Dixon, 3 Bro. C.C. 199.

Randall v. Randall, 7 Sim. 271; s. c. 4 Law J. Rep. (n.s.) Chanc. 187.

Balmain v. Shore, 9 Ves. 500.

Selkrig v. Davies, 2 Rose, 97.

Townsend v. Devaynes, Mont. on Part. p. 96, n.

Mr. K. Bruce and *Mr. Sharpe*, for the defendant John, the surviving partner, cited—

Phillips v. Phillips, 1 Myl. & K. 649; s. c. 1 Law J. Rep. (n.s.) Chanc. 214.

Mr. Rolt, for the defendants Thomas and Alice.

THE VICE CHANCELLOR.—In this case the plaintiff filed the bill, representing that he, as the heir-at-law of James Houghton, the younger, was entitled to the inheritance of a certain tenement, upon which a mortgage was made; and that the mortgage ought to be paid off out of the personal estate of the person creating the mortgage. He represents in the bill, that James Houghton, his father, and William, the brother of his father, in March 1816, purchased the tenement in question, and had it conveyed to them as tenants in common, in the usual way, with a trustee to bar dower. On the 19th of March they made a mortgage in fee to their father for 800*l.*, which was the amount of the purchase-money paid by them for the tenement. Then the bill represents, that William died in 1824, and that the equity of redemption in one moiety descended on James, the eldest brother of William. Then it represents, that the father, who had the legal estate, devised the legal estate so as to vest it in his sons

John and Thomas, (who were two other brothers of James and William,) and his three daughters. Then it represents, that the mortgage was paid off, and the legal estate conveyed to James and John; but it stated, that James did not acquiesce or concur in the same indenture. The bill then states the death of James, and the descent on the present plaintiff, his heir-at-law, of the whole beneficial interest. That case is supported by no proof whatever, except that the party answered the description of heir. The defendant meets this case by saying, first, that the tenement in question was purchased by James and William, who carried on business together, for the purpose of their trade of soap-boilers; and that when William died in 1824, John, who was the next brother, was taken into partnership, and carried on the business of soap-making in partnership with James, until James died. William died without issue, and the clear residue of his personal estate would have belonged to his father; the father did not however take it, but allowed it to be divided among his other children. The father died, having devised all his estates to John and Thomas and his three daughters, as tenants in common. Then it is stated, that this sort of transaction took place—namely, the father not taking William's estate, it was treated by the brothers and sisters of William as belonging to them; a valuation was made of all the partnership effects, and one moiety was assigned as the share of William. In making that valuation, a sum of 600*l.* was inserted as being the beneficial value of the tenement in question; and an account is produced, which certainly shews that this was so. The whole amount of the estate of William came nearly to 3,000*l.*, and therefore it was taken as if the share of each brother and sister amounted to 500*l.* Upon the strength of that arrangement, John actually paid to each of his four brothers and sisters a sum of 500*l.* as their shares. In pursuance of a settlement of the son's affairs as mixed up with the affairs of the father, James and John, who carried on the business, paid off the mortgage out of the partnership funds; that is to say, as the father had given his personal estate to John and Thomas and his three daughters, four-fifths of the mortgage money were

paid to Thomas and the three daughters. In pursuance of that transaction, by indentures of May 1831, the legal estate in four-fifths, which was vested in Thomas and the three daughters, was conveyed to James and John as joint tenants in fee. It is said, that James did not acquiesce in that conveyance. Much evidence has been given, and many exhibits were produced, and I took time to read them over; and it appears to me, I confess, that though there is some evidence that the tenement in question was purchased with partnership property, that evidence is not very conclusive. The mortgage was made to the father in fee, for the whole amount of the purchase-money. It rather appears, that they had borrowed the money from the father to purchase the premises. It was treated in some senses as partnership property: sums of money were paid to the father, under the name of rent, but manifestly for interest. Improvements were made for the purposes of the partnership business. There is evidence to shew, that 600*l.* was charged in the account with reference to those improvements, which actually cost that sum; and it might very fairly be considered that the property was mortgaged for the whole amount of the purchase-money. I admit it is in evidence, that some of the parties disputed the accuracy of the account, but the material fact is this, that for the purpose of dividing the personal estate of William, the valuation of this property, which was in the nature of real estate, was included; and that John, acting on the supposition that, on payment according to that account, he should acquire a moiety of this tenement as part of the personal estate of William, did actually make payments out of his own money to the persons among whom that estate was divided. James himself was perfectly cognizant of what was going forward. It is proved that a sum of 627*l.* was paid by a cheque on the partnership; so that it is clear that John, carrying on business with James, did allow a portion of the partnership assets, with the consent of James, to be applied in payment of the purchase-money of these premises. In that respect James was necessarily cognizant of it, and James allowed the partnership assets to be applied for paying off the mortgage. I do not think

that this case stands on the proposition, so broadly stated by Sir J. Leach in *Phillips v. Phillips*; but the question is, whether I have not sufficient evidence that James consented that, as regarded himself and John, this property should be treated as personal estate. I think the evidence amounts to that; but, if the conveyance was made to James, as well as to John, (I mean the conveyance of May 1831,) the legal estate in four-fifths was conveyed to James and John as joint tenants in fee, so as to produce this effect at least, that if the premises were not partnership property, these four-fifths must have survived and become the property of John. Independently therefore of the four-fifths on this view belonging to John, the dispute is only about one-fifth. These circumstances make it imperative on the Court to declare, that as between James, the plaintiff, as heir, and John, the estate in question is to be considered as personal estate. This bill has been filed either in ignorance of, or without regard to the facts of the case. If the real facts had been ascertained by application to the attornies who acted for all parties in these transactions, I think, the bill would never have been filed. The case set up, that James never acquiesced in the conveyance to himself and John, is totally without foundation; and I must dismiss the bill with costs.

V.C. }
May 5. } WALDO V. WALDO.

Timber—Tenant for Life unimpeachable for Waste—Tenant in Tail.

Timber was cut by trustees, with the consent of the tenant for life, impeachable of waste, and the proceeds were laid out in the purchase of stock, the dividends being paid to such tenant for life. On the death of that tenant for life, the next tenant for life in possession was unimpeachable for waste:—Held, that he was entitled to have the principal of the stock and monies produced by such timber, transferred and paid to him.

Jane Medley, by her will, devised her manor of Heavor, in Kent, and all other her manors, messuages, lands, tenements, and hereditaments in the same county, and

elsewhere, unto and to the use of a trustee, and his heirs, in trust, after the decease of the testatrix, to convey and settle the same manors and hereditaments in such manner as that the same might go and remain to the use of Jane Waldo, and her assigns, during her life, (but she not to have any power of cutting down more timber than merely necessary for repairs,) with remainder to the use of trustees, and their heirs, during the life of the said Jane Waldo, to preserve contingent remainders; but, nevertheless, to permit the said Jane Waldo, and her assigns, to receive and enjoy the rents and profits thereof, during her life, with remainder, after the decease of the said Jane Waldo, to the use of E. W. Mead Waldo, and his assigns, during his life, without impeachment of waste, with remainder to the use of the same trustees, and their heirs, to preserve, &c., with remainder to the use of the first and other son and sons of the body of the said E. W. Mead Waldo, severally and successively in tail; and, after divers remainders over, to the use of the right heirs of the said testatrix for ever. The testatrix died in 1829, leaving the said Jane Waldo, E. W. Mead Waldo, and Edmund, his eldest son, an infant, surviving. Jane Waldo entered into possession of the estates upon the death of the testatrix; and a considerable quantity of timber appearing, in 1831, to be in a state proper to be cut down, and shewing symptoms of decay, a survey was made under the authority of the trustees and the tenant for life, and a large number of trees were marked and sold. The produce of the sale of the timber was laid out in 3*l.* per cent. consols, and the dividends were paid to Jane Waldo during her life, after allowing her, out of the principal monies, a certain sum in respect of the value of timber purchased for repairs. Jane Waldo died in December 1840, and E. W. Mead Waldo thereupon became tenant for life of the estates, without impeachment of waste, and presented his petition, praying the sum of 2,637*l.*, 3*l.* per cent. consols, (being the remaining produce of the sale of timber,) might be transferred to him.

Mr. K. Bruce, Mr. Jacob, and Mr. Osborne, for the petition.

NEW SERIES, X.—CHANC.

Mr. Girdlestone and Mr. Briggs, for the other parties.

The authorities cited were—

Wickham v. Wickham, 19 Ves. 419.

Pyne v. Dor, 1 Term Rep. 55.

Lewis Bowles's case, 11 Rep. 81.

Co. Lit. 218, *b*, n. 2.

Pigot v. Bullock, 1 Ves. jun. 479.

Udall v. Udall, Allen, 82.

Per Lord Hardwicke, 3 Atk. 756.

The VICE CHANCELLOR.—I do not recollect that the precise question in this case was ever brought before the Court, until now. I remember when the case of *Tooker v. Annesley* (1) was before me, I was compelled, by the mode in which Sir Edward Sugden argued the case, to look into all the cases on the subject; and they only amounted to this, that where the Court does interfere, it will make the application of the produce of the timber, by investing it in the 3*l.* per cents., and will order the dividends to be paid to the party in possession. This case must be determined by analogy. The whole law, so far as the tenant for life, unimpeachable for waste, is concerned, is expressed in this resolution of *Lewis Bowles's case*, "Lastly, it was resolved, that the said woman, by force of the said clause of 'without impeachment of waste,' had such power and privilege, that though in the case at bar, no waste be done, because the house was blown down *per vim venti* without her fault, yet she would have the timber, which was parcel of the house, and also the timber trees which were blown down in the wind, and when they are severed from the inheritance, either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life, by force of the said clause of 'without impeachment of waste.'" I take that to be a true statement of the law on this subject. For that reason, when there is an estate settled on one for life, unimpeachable of waste, with remainders over, with a power of sale, to be exercised with the concurrence of the tenant for life, that power is not allowed

(1) 5 Sim. 235.

to be exercised in this manner, by the whole being sold, and the value of the timber {excepted from the whole of the purchase-money, and that paid to the tenant for life. That very case occurred nearly forty years ago, before Sir William Grant, who held, that a tenant for life who had the option of cutting down timber, could not sell the whole estate, and have excepted out of it the value of the timber. That case, as it stands, is only an authority, that where there is a tenant for life, unimpeachable of waste, where, by the act of the Court, or the act of a trustee out of court, which the Court has adopted, the Court has converted timber, part of the inheritance, into consols, and has dealt with it, as representing the inheritance, by giving, in commutation of the rights of the tenant for life impeachable of waste, the interest produced by the investment in the consols, where the estate of the tenant for life has ceased, the Court has only to consider the estate of the trustee, or person next in succession; and if he is unimpeachable of waste, when he asks for the corpus, he only asks for that which represents the right which, by analogy to law, he would have been entitled to exercise when he came into possession. By strict analogy to the right at law, when the estate of the person in remainder comes into possession, in the shape of an estate for life, unimpeachable of waste, the person having that estate is entitled to take that portion of the inheritance which is represented by the proceeds of the timber cut.

Ordered according to the prayer of the petition.

L. C. }
April 19. } HOGGART v. CUTTS.

Interpleader—Deposits on Purchase—Action—Injunction.

H, an auctioneer, was employed by T, to sell an estate belonging to him. H. sold the estate in 1835, by auction, to C, who paid H. a sum of 134l. by way of deposit. A discussion took place between T. and C, as to the estate sold, and T, on the ground that C. had failed to perform his contract, gave notice to him of his intention to put up the

estate to auction again, and T. employed H. for that purpose. C, on receiving the notice, warned H. not to resell the estate, and required him to hold the deposit money till the title was completed. H. however, by the direction of T, in 1837, resold the estate by auction, and V. became the purchaser, and paid 128l. as a deposit. Some difficulties respecting the title and the claim of C. became the subject of discussion between T. and V; and T, representing that V. had failed to perform his contract, and thereby forfeited his deposit, called on H. to pay him the two deposits, and H. having refused such payment, T. brought an action against H. to recover the amount of both deposits. C. shortly afterwards filed a bill against T. V. and H, for a specific performance of his agreement for purchase, and for some time the proceedings in T's action were stayed, but in May 1838, the plea being called for, H's solicitor gave notice of that proceeding to the solicitor of C. and V. T. required payment of the deposits, and offered H. an indemnity, and stated, that if payment were not made, he should proceed with his action. C. declined to move for an injunction in his suit, and told H. that if he paid his (C's) deposit to T, he would do so at his own peril, and V. required a good title or repayment of his deposit, with interest. H. filed his bill in June 1838, against T, C, and V, treating the case as an ordinary case of interpleader, and in the same month obtained an injunction against T. from further proceeding in his action, on payment of the amount of the deposits into court, and an injunction also against the other defendants from taking any proceedings at law, in respect of such deposits. The bill was dismissed with costs as against V, and the deposit paid by him ordered to be returned to H, and the injunction was dissolved as to T. and V, in respect of V's deposit, but continued in other respects as to T. and C.

The particulars of this case are reported in 9 *Law J. Rep.* (N.S.) Chanc. 374. Two of the defendants, Cutts and Vickers, appealed from the decision of the Master of the Rolls. The case was argued before the Lord Chancellor, by—

Mr. G. Richards and Mr. Rogers, for the plaintiff;

Mr. Lee and Mr. Heathfield, for Cutts,
and—
Mr. Tinney and Mr. Rasch, for Vickers.

The LORD CHANCELLOR was of opinion that this was not a case of interpleader, and ordered, that the bill should stand dismissed, with costs, as against Vickers, and with costs as to the other defendants, so far as related to Vickers, and to the purchase and deposit by him; and that the sum standing in the name of the Accountant General of this court, which had arisen from the sum of 128*l.*, the deposit paid by Vickers, be transferred and paid to the plaintiff Hoggart; and that so much of the injunction granted in this cause as related to the defendants Thodey and Vickers, in respect of the purchase and deposit by Vickers, be dissolved; and that the said injunction, as regarded the defendants Thodey and Cutts, be continued; and that Cutts should prosecute his suit against the plaintiff, Thodey and Vickers.

V.C. }
April 22. } FREEMAN v. ROBERTS.

Practice.—Form of Decree—Inquiry for Heir.

Under a direction, in a decree or order, to inquire who is the heir-at-law of a deceased person, it is not the practice to inquire who is the customary heir, although it appears that the deceased was entitled to land of copyhold tenure.

This was an application to add to the decree, by inserting a direction to inquire who was the customary heir or co-heirs of the testator. The decree, as drawn up, had contained a direction to inquire who was the heir-at-law; but it was stated, that under this direction no steps could be taken to ascertain more than who was the common law heir.

The VICE CHANCELLOR ordered the suggested inquiry to be added to the decree.

V.C. }
April 29. } LUGAS v. COLE.

Practice.—Lunatic Defendant.

Where it appears that a defendant, having been tried for a misdemeanour, is confined in a lunatic asylum, by order of the Secretary of State, the Court will direct a commission to issue to appoint a guardian, without the affidavit of a medical man.

The defendant was confined in the lunatic asylum at Northampton, by order of the Secretary of State for the Home Department, having been tried for violent conduct and breaches of the peace, but acquitted on the ground of insanity. The application was for a commission for the appointment of a guardian to the defendant; there was no affidavit by a medical man as to the defendant's state of mind.

Mr. Bird, for the motion (1).

The VICE CHANCELLOR made the order.

V.C. }
May 8. } *In re OMMANEY.*

Costs—Infant Heir—Mortgagor and Mortgagee—1 Will. 4. c. 60.

The costs of the petition and proceedings to obtain a re-conveyance of a mortgaged estate, from the infant heir of the mortgagee, must be paid by the mortgagor.

By a reference to the Master, upon the petition of the executor of a mortgagee in fee, it was found that the infant heir of the mortgagee was a trustee of the mortgaged estate for the executor, and this was the usual application, that the infant might be

(1) The following cases, on the appointment of guardians to adult defendants, were extracted from the registrar's book, as authorities for this application:—*Easterby v. Henwick*, 2nd of November 1835, R. Lib. A. 1835, fol. 5. Commission to appoint a guardian on affidavit that the defendant was incapable of understanding the subject of the suit; the application by a co-defendant.—*Smith v. Annesley*, 14th of February 1834, R. Lib. 1833, fol. 398. Commission to appoint guardian on a defendant's application.—*Mayo v. Wright*, 1st of March 1837, R. Lib. 1836, fol. 86, similar order.—*Miller v. Smales*, 31st of July 1829, R. Lib. 1828, fol. 1,759, guardian appointed on affidavit of medical man, as to incapacity of the defendant, to put in answer without oath or signature.

ordered to convey the estate to the mortgagor, on payment of the principal and interest due on the mortgage, and of the costs of the petition and proceedings before the Master. The mortgagor was willing, and had offered to pay the principal and interest, on the estate being re-conveyed; and the question was, whether the costs ought to be paid by the mortgagor, or by the executor, out of the assets of the mortgagee.

Mr. Dickenson, for the petitioner.—There is no ground for deviating from the ordinary rule, that all the expenses of the conveyance must be borne by the mortgagor.

Mr. Lloyd, for the mortgagor.—The special circumstance is, that the mortgagee has created the difficulty which occasioned the expense, by severing the right to the money from the right to the legal estate. He has given the money to one, and allowed the estate to descend on another.

The cases cited were—

Wetherell v. Collins, 3 Mad. 255.

Ex parte Richards, 1 Jac. & Walk. 264.

The Midland Counties Railway Company v. Westcomb, 2 N. H. and C. Railway Cases, 211.

Ex parte Marrow, L.C. 20th March 1841 (1).

The VICE CHANCELLOR.—The mortgagee is not by law bound to take any step to avert the legal consequences of the mortgage. If he had died without making any will, one person would have been his administrator, and another person, probably, his heir-at-law; and therefore, whether the will was made or not, the right to the money was likely to be dissevered from the right to the land. The mortgagor, if he desires to have the re-conveyance, must pay the costs.

(1) Not reported.

END OF EASTER TERM, 1841.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

TRINITY TERM, 4 VICTORIÆ.

L.C.
May 31; June 2. } WHITWORTH v. GAUGAIN.

Equitable Mortgage by Deposit—Priority—Elegit Creditor—Judgment—Pleading—Legal Interest—Costs.

W. & Co., bankers, being equitable mortgagees by deposit, under an agreement in writing, with C, the owner of certain freehold estates, filed their bill against B. and D, judgment creditors of C, who had, by legal process, under writs of elegit, and for the purpose of satisfying their debts, entered into possession of those estates. The bill stated a strong case of fraud and collusion against B. and D, and also against C, and charged that the actions brought by B. and D. respectively against C. (in which the judgments were obtained, and the elegits afterwards sued out,) were brought with the view and for the purpose of defrauding the plaintiffs, and defeating plaintiffs' equitable lien on C's estates, and that the elegits were therefore void as against the plaintiffs. The bill prayed a declaration, that the plaintiffs were entitled to priority over the elegit creditors respectively, and that the judgments and elegits might be declared fraudulent and void as against the plaintiffs, and that a receiver might be appointed:—

Held, on plaintiffs' motion for an injunction and receiver, that the charges of fraud and collusion having been positively denied by the defendants' affidavits, and the plaintiffs not having insisted on a right of priority of their security over the defendants', independently of the fraud and collusion charged by the plaintiffs, that the Court would not interfere, in favour of the plaintiffs, with the defendants' title.

It is questionable, whether, in a case where no fraud is proved, an equitable mortgagee by deposit is entitled to priority over a judgment creditor of subsequent date, who, by virtue of a writ of elegit, has entered into possession of his debtor's land, without notice of the equitable mortgage.

The costs of the motion, in the court below, where the injunction was granted, were made costs in the cause, on the ground of its being uncertain how the facts of the case would ultimately turn out.

The plaintiffs, H. B. Whitworth and Robert Whitworth, carried on business in the town of Northampton, as bankers, and had done so since the commencement of the year 1833, under the style of Charles Whitworth & Sons. George Cooke, of Northampton, became, in the year 1839,

indebted to the plaintiffs, as bankers, in the sum of 3,071*l.* 12*s.*, in respect of advances made by them to him in cash, and on divers promissory notes and bills of exchange, and also in the further sum of 360*l.* advanced by the plaintiffs to George Cooke, on the 20th of February 1839. On the 22nd of April 1839, George Cooke deposited with the plaintiffs the title-deeds and writings relating to a certain estate belonging to him, and called Parkfield, situate at Kingsthorpe, and also certain premises, called the Mounts, situate in the parish of St. Sepulchre, in the town of Northampton, which, it was agreed, should be held by the plaintiffs as a security for repayment of the sums, then and theretofore advanced by the plaintiffs to George Cooke, or such other sums as might thereafter be due from him to them, upon his general banking account; and the following memorandum, in writing, was signed and delivered to the plaintiffs on the same day by Cooke, viz. "Be it remembered, that on the 22nd day of April 1839, the title-deeds, relating to the messuages, hereditaments, and premises situate in the Mounts, in the town of Northampton, late the property of John Wright, and also of two parcels of land situate at Kingsthorpe, late the property of John Clarke, Thomas Richardson, and Elizabeth Johnson, were deposited by me, Mr. George Cooke, of Northampton, to Messrs. Charles Whitworth & Son, bankers of Northampton, in pledge, to secure to the said Messrs. Charles Whitworth & Son, or the survivor of them, or to any future partners interested in that banking establishment, his or their executors, administrators, and assigns, the repayment of the sum of 3,071*l.* 12*s.*, this day lent and advanced by the said Messrs. Charles Whitworth & Son to the said Mr. George Cooke, and interest on the same, after the rate of 5*l.* per cent. per annum; as also all and every sum and sums of money which they, the said bankers or co-partners, or any such other person or persons, have already or shall hereafter, at any time or times, lay out, pay, or advance to him, the said Mr. George Cooke, or become in anywise liable for or on his account, either as respects any bill or bills of exchange, drafts, notes, or other securities, or engagements what-

soever, and interest for the same sum and sums of money lent and advanced, and to be lent and advanced, after the rate of 5*l.* for every 100*l.* by the year. And I, the said George Cooke, do hereby engage, if required, to execute any legal mortgage or other security of the said premises and land to the said Charles Whitworth & Son, free of all expense. George Cooke."

On the 26th of November 1840, the plaintiffs commenced an action against George Cooke, Edward Lewis Mayor, George Pell, and Stephen Grainger Whitehouse, upon a promissory note for 380*l.*, dated the 19th of August 1840, and payable three months after date; and judgment was signed on the 15th of March 1840, in such action, against George Cooke, Edward Lewis Mayor, and Stephen G. Whitehouse, for the sum of 545*l.*, which remained unpaid. On the 16th of November 1840, separate actions were commenced in the name of George Pell and Edward Lewis Mayor respectively, against George Cooke; and on the 28th of November 1840, George Cooke signed two several cognovits, in those actions for the respective debts and costs in the said actions, viz. for the respective sums of 957*l.* 16*s.* 4*d.* and 416*l.* 16*s.* 7*d.*, payable on the 1st of December 1840. Judgments for George Pell and Edward Lewis Mayor were signed in the two actions on the 2nd of December, for the respective sums acknowledged to be then due by the two cognovits. Warrants to execute two writs of *elegit*, which had been sued out in the two actions on the 19th and 21st of December, were, on the 28th of December, received by the officers of the sheriff of Northamptonshire. On the 30th of December 1840, the officers of the sheriff, in pursuance of the writs of *elegit*, delivered to E. L. Mayor legal seisin of the premises in Kingsthorpe, and to George Pell legal seisin of the premises in the parish of St. Sepulchre, in Northampton, the whole whereof were comprised in the memorandum of the 22nd of April 1839. On the 31st of December 1840, the tenants of the respective premises, at the suggestion of the clerk of Cooke, who was a solicitor, attorned as tenants thereof to E. L. Mayor and George Pell. On the 3rd of February 1841, separate fiats in bankruptcy were issued against Cooke and

Edward Lewis Mayor, under which they were respectively declared bankrupts, and P. A. Gaugain was duly chosen the assignee of the estate and effects of Cooke, and Joseph Mayor was chosen the assignee of the estate and effects of E. L. Mayor. On the day on which the cognovits in the two actions were signed by Cooke, he executed a mortgage security to E. L. Mayor, to secure a debt due to E. L. Mayor from Cooke. The bill, which was filed on the 17th of March 1841, was against P. A. Gaugain, Joseph Mayor, and George Pell, as defendants.

The bill, after stating the above facts, charged that the plaintiffs were entitled, in respect of the securities holden by them, to priority over the *elegits*, and that the *elegits* were invalid and void as against the plaintiffs, and that the judgments upon such *elegits*, when obtained, were suffered fraudulently and without consideration, and with a view unjustly to deprive the plaintiffs of the benefit of their securities: that the proceedings so taken, in the names of the defendants George Pell and Edward Lewis Mayor, against George Cooke, and the *elegits*, were merely colourable, and that such proceedings were really instituted by and in pursuance of a fraudulent concert between George Cooke, E. L. Mayor, and George Pell, and principally by the means and intervention of George Cooke, and in order to prevent the plaintiffs from having the benefit of their securities, in the event of the bankruptcy of George Cooke; and in order and with the view that George Pell and Edward Lewis Mayor might hold the hereditaments comprised in the deeds and securities deposited with the plaintiffs, in trust for George Cooke, or some part of his family, or for the joint benefit of George Cooke and Edward Lewis Mayor, and George Pell. The bill also charged that the plaintiffs had an equitable lien upon the deeds and securities deposited with the plaintiffs by George Cooke, and that they were entitled, by reason of such equitable lien, to have the monies due to them, to which such lien extended, satisfied by a sale of the premises; and the prayer was for an account of what was due to the plaintiffs, in respect of the securities given to them by George Cooke, and of their equitable lien upon the deeds depo-

sited with them by George Cooke; and that the plaintiffs might be declared to have an equitable mortgage upon the hereditaments comprised in their securities; and that, as such equitable mortgagees, the plaintiffs might be declared to be entitled to preference and priority over the *elegits* and judgments thereinbefore mentioned; and that the latter were fraudulent and void, as against the plaintiffs, as such equitable mortgagees; and that the hereditaments, comprised in the plaintiffs' equitable mortgage, might be sold, and the amount due to the plaintiffs paid to them out of the produce of such sale; and that a receiver might, in the meantime, be appointed to receive the rents, and the defendants restrained from receiving the arrears of rent due in respect of the said premises, and the accruing and future rents thereof, and from taking proceedings at law or otherwise interfering with selling, or in anywise incumbering the premises, or the rents and profits thereof.

The defendants, G. Pell, and George Cooke, and Edward Lewis Mayor, denied the fraud, concert, and collusion charged against them in the bill, or that the *elegits* were obtained without consideration: on the contrary, they stated that the actions were brought by George Pell and Edward L. Mayor against Cooke, upon valid engagements and *bond fide* debts, due from G. Cooke to the plaintiffs in those actions. No notice of the plaintiffs' equitable mortgage was charged, by the bill, to be within the knowledge either of George Pell or E. L. Mayor, at the date of the judgments or writs of *elegit* sued out in their respective actions. On the 22nd of March 1841,—

Mr. Knight Bruce and *Mr. Robert Whitworth*, on behalf of the plaintiffs, moved, before the Vice Chancellor, for an injunction, and a receiver, against the defendants, to the effect prayed by the latter part of the bill, which was opposed by—

Mr. Jacob and *Mr. F. J. Hall*, for the defendant George Pell, and by

Mr. J. Wigram, *Mr. J. Russell*, *Mr. G. Richards*, and *Mr. Anderdon*, for the other defendants.

The motion was granted by his Honour, whereupon the defendant Joseph Mayor appealed from his Honour's order.

Mr. J. Wigram, Mr. G. Turner, and Mr. F. J. Hall, in support of the appeal, contended, that the case attempted to be made by the bill from the beginning to the end was one of alleged fraud, practised towards the plaintiffs, and the same being entirely displaced by the affidavits of the bankrupts, the order for the injunction and receiver must be discharged: that the sums of money, for the recovery whereof the actions were commenced and prosecuted against Cooke, having been sworn to be justly due and owing from him, and the plaintiffs in those actions having, by regular process, obtained legal possession of the premises without any notice or knowledge of the plaintiffs' equitable mortgage thereon, the defendants had a right to retain that possession against the plaintiffs: that the plaintiffs did not, by their bill, charge the defendants, or the bankrupt Mayor, with having ever had even constructive notice of their security: that it was clearly proved that the actions prosecuted against Cooke were in respect of valuable consideration, which had previously passed from Pell and E. L. Mayor to Cooke; and that, if the plaintiffs' case, as made by the bill, was established, then a charge of notice would have been surplusage.

Metcalfe v. the Archbishop of York, 1 Myl. & Cr. 547; s. c. 4 Law J. Rep. (N.S.) Chanc. 154.

Plumb v. Fluit, 2 Anst. 432.

Mr. Griffith Richards and Mr. Robert Whitworth, in support of the order of his Honour, contended, that a judgment creditor could not be considered in the light of a purchaser; that a creditor, by *elegit*, could take no more than his judgment entitled him to; that the plaintiffs were clearly entitled to priority; that if the doctrine contended for on the other side, were to prevail, no judgment creditor would ever think of making any inquiry as to the incumbrances on his debtor's estates, or in whose custody his debtor's title-deeds were; and they insisted, that the circumstances stated in the plaintiffs' affidavits, and not denied by the affidavits on the other side, shewing the strong intimacy and close connexion existing between the defendants Pell and Mayor,

and the bankrupts, the fact of a mortgage security having been given by George Cooke to E. L. Mayor, on the same day as the cognovits were executed by Cooke, the circumstance of Jones, the clerk of Cooke, having professionally acted for E. L. Mayor in some of the proceedings, and particularly in obtaining the attornments of the tenants of George Cooke's estates, which were comprised in the plaintiffs' securities, were cogent evidence of the judgments and *elegits* having been obtained collusively and in concert, and were a sufficient ground for sustaining the order of the Vice Chancellor.

The following cases were cited on behalf of the plaintiffs—

Ex parte Knott, 11 Ves. 609.

Finch v. the Earl of Winchelsea, 1 P. Wms. 277.

Mestaer v. Gillespie, 11 Ves. 621, 640.

Huguenin v. Baseley, 14 Ves. 273.

Burgh v. Francis, 3 Sco. 536, n.

Bac. Abr. vol. 5. pp. 43, 57.

Averall v. Wade, 1 L. & G. 252.

Brace v. the Duchess of Marlborough, 2 P. Wms. 491.

Mackreth v. Symmons, 15 Ves. 329, 350.

Casberd v. Ward, 6 Price, 411; s. c. 1 Dan. 238.

THE LORD CHANCELLOR.—The plaintiffs' case, as made by the bill, and made by the affidavits, is simply this, that having had dealings with the party under whom they claim, a person of the name of Cooke, and a debt having become due from Cooke to them, Cooke deposited certain title-deeds with them under a written agreement, constituting undoubtedly, as between themselves and Cooke, an equitable mortgage. They then say, that a fraudulent combination was formed between Cooke and the other persons who are parties defendants to this bill, for the purpose of depriving them of the benefit of their equitable mortgage; and that, although there was no consideration, no debt due from Cooke to these other parties, they agreed there should be an action brought, and then judgment confessed, and an *elegit* issued, so as to put these defendants in possession of the premises, which were within the contract for the equitable mortgage, which the plaintiffs claim.

The bill then contains a variety of allegations, for the purpose of making out this case of fraud, assuming, from the beginning to the end, that these defendants have no title to hold under this arrangement between Cooke and themselves, to the prejudice of the plaintiffs, and it prays that these judgments and *elegits* may be declared fraudulent and void, and that the plaintiffs may have the benefit of their equitable mortgage. The case so stated, is supported by the plaintiffs' affidavit, and by the affidavits of several other persons, who speak to detached parts of the case, for the purpose of supporting the title to the relief sought by the plaintiffs. There is no allegation in the bill or affidavits of these defendants having had notice of the plaintiffs' demand; nor is that much to be wondered at, because the whole state of the case, as represented by the bill and the affidavit of the plaintiffs, if true, would necessarily assume notice. It is represented as a combination between these parties, for the purpose of defeating the plaintiffs' equitable mortgage; and if that had been so, it would be unnecessary to allege notice, because notice is necessarily implied from the case made by the bill. The facts, so far as they are stated in the bill for the purpose of constituting a case of fraud, are denied by the affidavits. No doubt there are circumstances which are matter of observation, at least as to the mode in which the defendants obtained these *elegits*. There seems to have been a very intimate connexion between Cooke and these defendants, and very great facilities afforded to them, by which they obtained these *elegits*; but whatever fraud there may have been, as between Cooke and the plaintiffs, whatever fraud Cooke may have intended against the plaintiffs, the question is, whether these defendants, who are now tenants by these *elegits*, are or are not implicated in this fraud; because, if they have got that sort of interest in the land which enables them to maintain their title to it as against the plaintiffs, it is not material whether Cooke gave them that benefit with a fraudulent intention, as against the plaintiffs;—the question is, whether they are participators in that fraud, so as to affect the security they have got. That they positively deny; and I do not

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think, upon the affidavits, much doubt remains, but that they were *bond fide* creditors of Cooke. Cooke may have intended to have given them a benefit, and to secure their debts in preference to others, and there may have been that degree of understanding of fraud between Cooke and themselves, as will invalidate their title as against the plaintiffs—there may or may not be fraud, as the facts may turn out; but these affidavits negative all such allegation of fraud, as far as concerns them.

It appears, that when this case came on before the Vice Chancellor, it was argued, as would naturally be expected, upon the case made by the bill and affidavits. The Vice Chancellor seems to have been struck with the circumstance of there being no denial of notice, and according to the representation made to me of the ground on which the Vice Chancellor put his order, he proceeded upon this, viz. that the defendants had not denied that they knew of the plaintiffs' equity. If they knew of the plaintiffs' equity, and took a legal interest, with a knowledge thereof, undoubtedly they could not hold that legal title to the prejudice of the equity. Whether it was called to his Honour's attention or not—how the case stood upon the affidavits, or in what manner the pleadings were framed—and how far a case of fraud was throughout negated by the affidavit of the defendants (and there being no allegation of notice, no denial could be expected), I have no accurate information; but there seems to be no doubt the case was brought on before the Vice Chancellor upon the case made on the pleadings and affidavits, and that the order proceeded on the suspicion excited in his Honour's mind, of the fact of notice not being negated by the affidavits.

Now, the case comes on before me, and the Vice Chancellor had the same information, as to the facts and state of the pleadings, as I have acquired, partly from statements at the bar, and partly from having read the pleadings myself; and I think his Honour would not have made his order in the absence of denial of that which was not clearly charged by the bill, and which, in fact, in the shape and form in which the plaintiffs brought on their case, did not constitute part of their case; for they

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put their case much higher, and say, "it is not that you are not entitled to your legal right of possession, because you had the knowledge of our equity, but your legal interest is altogether compounded of fraud; it is manufactured for the purpose of depriving us, the plaintiffs, of our equity, and consequently you cannot hold as against us." Such, however, seems to have been the ground on which the Vice Chancellor's order proceeded; and looking at it with that view, considering the case as it is stated by the bill, and considering the ground on which the Vice Chancellor's order proceeded, if there had not been the additional affidavit, with which I have been furnished, I should have thought the absence of such an affidavit ought not to have been the ground of the order which has been pronounced. I have now, however, an affidavit in order to supply what the Vice Chancellor thought necessary for the defendants' case. I have an affidavit made by the defendants, in which they positively deny (whether it is true or false I have no means of ascertaining, but I am bound to give credit to it, there being nothing against which it is to be balanced,) any knowledge or notice of the plaintiffs' equity at the time when they obtained this legal right to hold possession by virtue of this *elegit*. According to the case made, therefore, the bill praying, not that the plaintiffs might be declared to be entitled in equity in preference to the *elegits*, but that the *elegits* may be declared fraudulent and void, as well as the proceedings which led to those *elegits*, I am bound to say, that, upon the evidence, as it now stands, there is no case made out to interfere with the defendants' legal title.

At the bar, however, in the argument, a totally different turn was given, or attempted to be given, to the plaintiffs' case. It was attempted to be said, that at law, independently of the question of fraud, the plaintiffs had a preferable title to the defendants. Now if that be so, it is quite immaterial to the plaintiffs, whether the *elegits* were fraudulent or not. In short, it would be a hopeless piece of fraud to manufacture that which, when manufactured, would have no effect against the plaintiffs' equity. It is clear, therefore, that was not the ground on which the bill

was filed, and yet the bill prays, that this judgment and *elegit* may be set aside as fraudulent and void as against the plaintiffs, with which the plaintiffs had nothing whatever to do, if they stood in the situation in which they had a preferable equity—an equity which would give them a preferable title as against the title now claimed by the defendants. It is quite sufficient for the present purpose to say, that is not the case made by the plaintiffs. The plaintiffs' case is founded on totally different grounds. It is not made on the pleadings—it is not made in argument before the Vice Chancellor, and is only suggested when it comes to be argued before me. I therefore abstain from going further into the matter than to say, that if the bill had been framed for that purpose, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity, before I could interpose by interlocutory order; because I find these defendants in possession of a legal title,—although not, to all intents and purposes, an estate, yet a right and interest in the land, which, under the authority of an act of parliament, they had a right to hold, the *elegit* being the creature of an act of parliament; and therefore they have a parliamentary title to hold the lands against all persons, unless a case of equity should be made to induce this Court to interfere.

I was a good deal struck, at the time it was quoted, with that case decided in the Exchequer,—decided by a high authority, and evidently after very considerable pains taken to ascertain the state of the law on that subject (I mean the case of *Casberd v. the Attorney General*, decided by Richards, C.B., in the Exchequer); and I was very much relieved when I read that case, because I observe the Chief Baron puts it entirely upon this, viz. that it was a contest between the two equities; there was no debt of record due to the Crown, but only a mere equitable debt due to the Crown, and therefore it was no contest between a legal title and an equitable claim, but between two equities; and therefore as between two equities the prior equity was, of course, to be preferred. When the case comes to be examined, it is not only not an authority for the argument contended for, but

it seems that if there had been a legal title, against which the claim of the equitable mortgagee was opposed, that that legal title would have prevailed; and if Mr. Richards looks into that case, it will appear to have been the Lord Chief Baron's difficulty, (whether he is right or wrong, with regard to the extent, is not at all material for the present purpose,) how far the circumstances of the case, constituting the claim of the Crown, gave the Crown any benefit which the Crown was entitled to, or whether it was not a mere simple contract debt, which the Crown was entitled to, and which did not give the Crown any benefit as against the parties contesting; that it did not give the Crown the same right as it would have given if there had been a debt on record. The Lord Chief Baron puts it very distinctly on that ground; and being of opinion the Crown had no such right when the debt was not on record, and being of opinion it was a contest between two equities, he decided in favour of the prior equity. I am glad to find that, because I should have found great difficulty, if the transaction had been otherwise, to have understood on what ground the Court proceeded; but assuming the Court to have been right in that view of the nature of the debt due to the Crown, it does not, in the least, operate on the question now before the Court.

However, I do not enter further into that than to explain what I find to be the result of the case of *Casberd v. the Attorney General*. It is quite sufficient, for the present purpose, that the plaintiffs have failed in making out the case on which they ask for the interposition of the Court; and I am therefore of opinion, the Vice Chancellor's order must be discharged.

The costs of the motion, in the court below, were ordered by his Lordship to be costs in the cause, on the ground of its being uncertain whether the alleged fraud would be ultimately established.

The plaintiffs, after his Lordship's decision, amended their bill, by striking out some of the strongest charges of fraud, and insisting that they were entitled to priority in respect of their security over the judgments and *elegits* mentioned in the bill,

whether the *elegit* creditors had or had not notice of that security; and the prayer of the bill was varied accordingly.

The plaintiffs then gave a notice of motion, before his Lordship, for the appointment of a receiver, and to revive the injunction granted by his Honour the Vice Chancellor; but inasmuch as the rents and profits of the estates that might be received by the defendants, could not be safely distributed until after the hearing of the cause, in case the defendants were successful, it was arranged between the counsel for the different parties, and ordered, that, by consent, and without prejudice to the questions raised in the cause, the injunction should be revived, and the plaintiffs appointed receivers of the estates without salary or compensation.

V.C. }
May 5, 6, 27. } SELWAY v. CHAPPELL.

Practice.—Witness—Interest—New Commission after Examination—Costs.

Where a party, after the examination of a witness in a cause, discovers that the witness was interested in the suit, he is entitled to a new commission to cross-examine that witness, and to examine other witnesses as to the matter of his interest; but he must pay the costs of the motion and of the new commission.

This cause being at issue, a commission was issued on the 11th of January, for the examination of witnesses, and was made returnable in three weeks from Easter-day. The commissioners met and examined several witnesses for the plaintiff, and adjourned their proceedings to the 29th of April. After the examination of one of the witnesses, produced on behalf of the plaintiff, named J. Rich, the defendant discovered (as was represented by affidavit) that such witness was interested in the suit, or in the result of it, and had become a guarantee, or made himself jointly liable with the plaintiff and other parties to their solicitor, for his costs and expenses in the suit, and that Rich had already paid or allowed to the said solicitor a sum of money towards defraying the expenses of the

cause. The defendant then gave notice of motion in Easter term, that they might be at liberty to exhibit interrogatories before the same commissioners for cross-examining or to examine the said J. Rich, as to his being interested in the suit, or the result thereof; and that the defendant might also be at liberty to exhibit interrogatories to other witnesses or witness, to prove that the said J. Rich is so interested, and that, if necessary, the said defendant may be at liberty to take out a new commission for the examination of J. Rich and such other witnesses accordingly.

Mr. Jacob and Mr. Follett for the motion, cited—

Willett v. Burley, M.R. Hilary term, 1841 (1).

Vaughan v. Worrall, 2 Swanst. 395; s. c. 2 Madd. 322.

Mr. James Parker, contra, cited 2 *Dan. Ch. Pr.* 487.

The VICE CHANCELLOR made the following order:—"This Court doth order that the defendant be at liberty to exhibit interrogatories for cross-examining, or to examine the witness John Rich, of Stoke Lane, in the county of Somerset, grocer, already examined on the part of the plaintiff, as to his being interested in this suit, or the result thereof; and it is ordered that the said defendant also be at liberty to exhibit interrogatories to other witnesses or witness, to prove that the said witness, John Rich, is so interested; and it is ordered, that the plaintiff be at liberty to cross-examine such other witnesses or witness; and it is ordered, that the said defendant be at liberty to take out a new commission for the examination of the said John Rich, and such other witnesses accordingly, returnable on the third seal after Trinity term next, directed to the same commissioners to whom the former commission is directed; and it is ordered, that the costs of the application (to be taxed by the Master in case the parties differ), and the expense of the new commission, be borne and paid by the defendant."

(1) Not reported.

M.R. } HOLMES v. THE MAYOR, &c. OF
April 23; } THE BOROUGH OF ARUNDEL,
une 21. } AND BALCHIN.

Practice.—Order—Examination of Defendant—Replication.

B; a member of a corporate body, comprised in the act 6 & 7 Will. 4. c. 104, who were defendants in a suit, was examined under the usual order of the Court, saving all just exceptions; as a witness for the plaintiff, after a replication had been filed to the answer by the corporate body, and without the same being previously withdrawn: Held, that the order was irregular.

This was an application on the part of the defendants to discharge, for irregularity, an order of the Master of the Rolls, dated the 30th of March 1841, giving to the plaintiff liberty to examine the defendant Balchin, and also John Halliday, one of the councillors of the borough of Arundel, as witnesses for the plaintiff, saving all just exceptions. Halliday was not present when the answer of the mayor, &c., to be put in to the plaintiff's bill, was prepared, and had no knowledge of the particulars thereof. A commission for the examination of witnesses was issued by the plaintiff, in which the defendants joined, and the examination of witnesses thereunder commenced on the 5th of April. On the 2nd of April notice of the order of the 30th of March was served on the defendants, and notice of the present motion was served on the plaintiff on the 6th of April.

On the 3rd of April the defendant Balchin was served with a subpoena and notice to attend the commissioners on the 5th of April, to be examined as a witness for the plaintiff, and on the 5th he accordingly attended, and informed the defendants' agent of his intention to protest before the commissioners against being examined. On the 7th of April, the defendants' agent informed the defendant Balchin, that the plaintiff would have no occasion to examine him. On the 10th of April, Halliday was examined by the commissioners, on the part of the plaintiff, notwithstanding objections were previously raised on the part of the defendants before the commissioners to his being examined, on the ground of his being a defendant in the suit, and that the

plaintiff had replied to the answer of the corporation, Halliday being at that time one of the corporation councillors.

Mr. Pemberton and Mr. Rogers, in support of the application, contended, that having on the 6th of April served the notice to discharge the order of the 30th of March, there was no pretence for saying, that the defendants had waived their objection thereto; that Halliday, being one of the borough councillors, was as much one of the defendants, as if his name had been formally on the records of the court; that the acknowledged principle in cases of this kind was, that where a plaintiff intends to examine a defendant as a witness, he must not reply to his answer, and in case a replication has been filed to the answer, the plaintiff must withdraw it before he can examine the defendant; that as to Halliday, the proceeding was clearly irregular on the form of the order itself, for if the plaintiff asks for no decree against Halliday, he can have none against the corporation, of which Halliday is one of the members.

Smith's Chanc. Prac. vol. 1. p. 345;

Winter v. Kent, 2 Dick. 595;

Harvey v. Tebbutt, 1 Jac. & Walk. 197, were cited in support of the motion.

Mr. Wray, contra, for the plaintiff.—The principal question is, as to the examination of Halliday, as against whom we could not withdraw the replication, inasmuch as it is a single replication against the whole corporate body, of which Halliday is one of the members. As regards Balchin, who was made a defendant, as the solicitor or clerk to the corporation, the plaintiff gave him timely notice that he did not intend to examine him as a witness, and it was in his power to have demurred to the evidence, if he had chosen to pursue that course. Besides, from the nature of the case, the defendant Balchin could have no interest in the matters in question in the suit, and the motion on the part of Balchin is clearly irregular. By the 6th section of the statute 6 & 7 Will. 4. c. 104, it is enacted, "that no burgess of any borough named in the schedules shall be deemed an incompetent witness in any suit or proceeding at law or in equity, by reason of his being a member of such body corporate, or interested in the borough fund

of any borough." If the statute did not allow a member of the corporate body to be examined as a witness in a suit like the present, the evil arising from such a state of things would be serious in its nature; but the enactment in reality is tantamount to this, viz. that Halliday having no particular interest in the subject-matter of the suit, there is nothing to prevent his being examined as a witness for the plaintiff; and all that can now be urged against the examination of Halliday, might be with equal success urged against his evidence at the hearing of the cause.

Nightingale v. Dodd, Ambl. 583;

Cookball v. Smith, 2 Fowl. Pr. 101;

Murray v. Shadwell, 2 Ves. & Bea. 401, were cited on behalf of the plaintiff; in opposition to the motion, as authorities tending to shew that a defendant may be examined as a witness, without the replication previously filed being withdrawn.

THE MASTER OF THE ROLLS.—His Lordship, after stating the facts of the case, observed, that if an answer were not replied to, it must be taken as true; and a defendant might no doubt be examined relative to matters and facts in which he had no interest; but that in every case a replication had the effect of denying the truth of the whole answer; and a plaintiff could not be heard to allege that the defendant was not interested in the matters in question in the suit, whilst the replication to the answer remained on the files of the court; that it was unnecessary to consider what might be done as between co-defendants in a suit, on an application to the Court to examine a co-defendant under special circumstances, but, under the circumstances of the present case, his Lordship was of opinion, that the order of the 30th of March must be discharged, with costs.

L.C. }
June 12. } LEWIS v. EVANS.

Practice.—Contempt—1 Will. 4. c. 36.

A prisoner in custody for contempt, for want of appearance, is entitled to be discharged at the expiration of the thirty-five days, allowed by the 13th rule of 1 Will. 4.

c. 36, where the plaintiff has not, within that time, entered an appearance for him; notwithstanding the provisions of the 5th rule of that act.

The defendant, Evans, not having appeared to the bill, an attachment issued against him on the 11th of January 1841. He was taken into custody on the 9th of February, and lodged in Cardiff Gaol. On the 8th of March, the plaintiff applied for a writ of *habeas corpus*, to bring Evans to the bar of the court; and, on the 15th of April, the Master of the Rolls made an order, that he should be turned over to the Fleet. On the 23rd of April, the clerk in court entered an appearance for him. Evans did not put in an answer; and, on the 27th of April, an attachment was issued against him for want of answer.

On the 10th of May, two motions were made before the Master of the Rolls, on behalf of the defendant; one, that the attachment, issued for want of an answer, might be set aside for irregularity; and the other, that the defendant might be discharged out of custody, without paying any of the costs of the contempt. The Master of the Rolls refused both motions with costs.

A motion to the same purport as the two former motions, and that the order of the Master of the Rolls might be discharged, was now made before the Lord Chancellor.

Mr. Cooper, for the defendant, insisted that the proceedings in this case ought to have been regulated by the 13th rule in 1 Will. 4. c. 36 (1). By that rule, a de-

fendant who was in custody for contempt, for want of appearance, was allowed twenty-one days to enter an appearance, and, in default, the plaintiff was allowed fourteen days from the expiration of the twenty-one days, to enter an appearance for him; but, if the plaintiff omitted to do so, the defendant was then entitled to his discharge. Here, the defendant was taken on the 9th of February, and the appearance was not entered till the 23rd of April.

Mr. G. Richards, contra, contended, that under the 5th rule (2), the defendant was brought to the bar of the court within the time allowed to the plaintiff: that the thirty days mentioned in that rule, expired in vacation, and that the defendant was brought to the bar of the court as soon as possible after the commencement of the next term.

The LORD CHANCELLOR said, that the terms of the 13th rule were perfectly clear; and, that the 5th rule did not apply in the case; and that the prisoner must be discharged.

to be entered for the defendant, under the powers of this act, and shall, at the expiration of such two calendar months, proceed to take the bill *pro confesso*, or in default of so doing in either of such cases, the defendant shall, upon application to the Court, be entitled to be discharged out of custody, without paying any of the costs of the contempt, unless the Court shall, under the power hereinbefore contained, see good cause to remand and detain the defendant in custody."

(2) 5.—"That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the court under process, to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an *habeas corpus* to the bar of the court, within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt; and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term; and in case any such defendant shall not be brought to the bar of the court within the respective times aforesaid, the sheriff, gaoler, or keeper, serjeant-at-arms, or messenger, in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued."

(1) 13.—"That where the defendant is in contempt for not appearing or not answering, and in actual custody under process for such contempt, or being already in custody, shall be detained by an attachment for such contempt, and shall not, where the contempt is for not appearing, enter an appearance within twenty-one days after he is lodged in gaol or prison, or the attachment is lodged against him, (he being already in prison,) as the case may be, or, where the contempt is for not answering, put in an answer within two calendar months after he is lodged in gaol or prison, or the attachment is lodged against him, he being already in prison, the plaintiff shall (as the case may be) within fourteen days after the period, computed from the expiration of such twenty one days, within which, he may, by the provisions of this act, be able to enter such appearance, cause an appearance

M.R. }
July 20, 22. } LLOYD V. LLOYD.

Legacy—Construction—Lapse.

*A testatrix directed her trustees to divide her residuary personal estate into three parts, and directed that, out of one of the shares 500*l.* should be paid to one of her sons, and the interest of the remainder of that share was to be paid to him for life, and after his death, the principal to be divided among his children. The son died in her lifetime:—Held, that there being a severance of the residue by the directions of the testatrix, the 500*l.* lapsed to the next-of-kin.*

The testatrix gave all her residuary personal estate, after payment thereof of all her just debts, legacies, and expenses attending thereon, upon trust to divide the residue thereof in three equal parts or shares, and as to one equal third part of such residue, upon trust to pay or transfer the same unto her son John Lloyd; and as to one other equal third part thereof, upon trust, that her said trustees, or the survivor, &c. should, within the space of six calendar months next after her decease, pay unto her son Charles Lloyd, the sum of 500*l.*, part thereof, to and for his own sole and absolute use and benefit, and as to the residue and remainder of such last mentioned one-third part, upon trust for Charles Lloyd, for life, with remainder to his children; and as to the remaining one-third part of such residue of her estate, she gave the same to Charlotte Hodgkinson, for life, with remainder to her children.

Charles Lloyd died in the lifetime of the testatrix; and the question was, to whom the 500*l.* belonged.

Mr. Pemberton and Mr. K. Parker, for the plaintiffs, the children of Charles Lloyd.

Mr. Rogers, contra, cited Skrymsher v. Northcote (1).

Mr. Tennent, for the children of Charlotte Hodgkinson.

July 22.—The MASTER OF THE ROLLS.
—I have looked over the case of *Skrymsher v. Northcote*, and I confess that I am not able to find that there is any substantial difference between that case and the present. There, the material division of

(1) 1 Swanst. 566.

the fund, which the testator made, was this, he gave to each of his daughters a life interest, with remainder to their children, making, in the event of there being no children, an absolute severance of the two funds. If there was no issue of one of the daughters, two sums of 800*l.* and 500*l.* were to be paid out of that moiety, and the remainder of the moiety was to go over to the other sister, subject to the same limitations. The bequest of 500*l.* was afterwards revoked, and one of the daughters died unmarried; and the question there was, whether the sum of 500*l.*, in the event which happened, was to go to the other residuary legatee, or was to go to the next-of-kin. Sir T. Plumer determined that it was to go to the next-of-kin. He considered that there was a subdivision of the residue, and that the next-of-kin were entitled to it.

In this case, the testatrix gives the residuary estate to trustees, and directs it to be divided into three equal portions, one for John Lloyd absolutely; out of the second moiety, she gives 500*l.* to the father of the children, who were intended to have the remainder; and then she gives the remainder of this third part to the same party, for life, with remainder to his children; and the third part she gives to another branch of the family. I am satisfied, the testatrix, if she had thought of the event which happened, namely, the death of the father in her own lifetime, would have given the whole of the share to the children; but looking at what was said by Sir T. Plumer, I must consider that the 500*l.* has lapsed for the benefit of the next-of-kin.

M.R. }
July 22. } SALOMON V. STALMAN.

Practice.—Misnomer.

An order which had been taken on motion by the defendants, upon affidavit of service of notice of the motion, was discharged, on the ground of a misnomer of the defendants in the notice of motion.

A notice of motion was given by the defendants, to dismiss a bill for want of prosecution, and was entitled in a cause, in which Joseph Constant Salomon was

plaintiff, and George Stalman, and Elizabeth Ann his wife, John Stalman, and George Thomas Stalman, an infant, by the said George Stalman, his father, were defendants.

The plaintiff did not appear upon the motion, but filed a replication on the day on which the motion was to have been made. On the next seal day, the defendant obtained an order, upon affidavit of service of the notice of motion, that the plaintiff should pay the costs of the application.

It was now moved, on behalf of the plaintiff, that this order might be discharged for irregularity, on the ground that the notice of motion had described the first-named defendant as *George Thomas Stalman*, whereas his name, as stated on the record, was *George Stalman* only. Other objections were also raised, but the Court decided the case without referring to them.

Mr. Pemberton appeared in support of the motion, and—

Mr. Addis, contra.

THE MASTER OF THE ROLLS.—The order was not regular, because the name of *George Thomas Stalman* is substituted in the notice of motion for *George Stalman*. This is enough in itself to decide this motion. If the defendant had appeared, there would have been no difficulty in setting the matter right; but when a party takes an order on affidavit of service, he takes it subject to all formal objections which can possibly be taken to it. It has sometimes occurred, that parties, in order to embarrass their adversary, have not appeared, and, at the same time, have been present and watched the proceedings, in order to discover some irregularity, of which they might take advantage.

M.R. }
July 27. } UPJOHN v. UPJOHN.

Practice.—*Supplemental Bill—Orders of May 1839—Preliminary Inquiries.*

The sole plaintiff in a cause obtained an order, upon motion, directing certain preliminary inquiries to be made, under the general order of May 1839. The plaintiff died before any report was made, and before any decree had been made in the cause. One

of the defendants filed a supplemental bill, to have the benefit of that order, and the inquiries thereby directed:—Held, that such bill was regular.

In 1839, a suit was instituted by *Catherine M. Upjohn*, who was tenant for life of certain estates under the will of the testatrix in the cause, for the purpose of having the trusts of the will carried into execution. One of the defendants was *Francis Upjohn*, the husband of the plaintiff: he was also the personal representative of one of their children, who had died, and who was entitled in remainder expectant upon the decease of the plaintiff.

In November 1839, the plaintiff obtained an order upon motion, made in pursuance of the general orders of May 1839 (1), by which it was referred to the Master to make certain inquiries, who were the heir-at-law and next-of-kin of the testatrix in the cause, and what the trust property consisted of, and in whom it was vested as trustees, and respecting the state of the family of the devisee.

While proceedings were pending in the Master's office under the order, the plaintiff died, and *Francis Upjohn* became her personal representative. He filed a bill, in which he set forth the proceedings in the original suit, and prayed a declaration, that, as representative of the deceased son of the tenant for life, he was entitled to continue the original suit, which had become abated, and to have the benefit of all proceedings therein; and that this bill might be taken as supplemental; and for further declarations respecting the rights of the parties in the property.

Mr. Pemberton and *Mr. White* appeared for the plaintiff.

Mr. Purvis, for some of the defendants, submitted whether, as no decree had been made in the original suit, the Court would make such an order as was now asked for.

Mr. Campbell, for other defendants.

THE MASTER OF THE ROLLS said, that the Court would endeavour to carry out the new orders, so as to render them as beneficial as possible to the suitors, and that he was of opinion that the order which was asked for, ought to be made.

(1) See 8 Law J. Rep. (N.S.) Chanc. 273.

L.C. { RICHARDS v. MACCLESFIELD.
July 13. { COCKS v. EDWARDS.

Mortgage—Stamp Act—Premiums—Construction—Contract—Policies of Assurance.

In a mortgage security, H. covenanted with C. & Co. to pay the principal sum (6,648l. 3s. 4d.) and interest thereon at 5l. per cent., &c., and that he would pay during the life of R. the premiums on three policies of insurance, and that in case of default it should be lawful for C. & Co. to pay any sums requisite for keeping on foot or renewing the policies. And it was further agreed, that the sums that should be so advanced should be charged upon the mortgaged premises, and carry interest at 5l. per cent., and be raised in like manner as the other monies thereby secured: provided, that the total amount of the monies secured, and to be ultimately recoverable by virtue of the mortgage security, exclusive of the sums of 3,000l. and 2,000l. secured by bonds, (being part of the said principal sum) in respect whereof the proper ad valorem stamp duties had been already paid, should not exceed the sum of 3,000l.; the stamp impressed on the mortgage security covered only the sum of 8,000l.:—Held, that the Master was correct in finding the amount due to the mortgagees to consist of the principal sum originally advanced, and a further sum, being the amount of monies advanced in payment of certain only of the premiums due on the three policies of assurance, altogether amounting to the sum of 8,000l., and also of the further sums of 3,417l. 17s. 7d. and 497l. 14s. 6d., being interest due respectively on the original principal sums of 6,648l. 3s. 4d. and 1,351l. 16s. 8d., the amount paid in respect of such premiums.

By a decree, dated the 7th of November 1837, it was amongst other things ordered, that the Master should inquire, and state to the Court, what was the amount due to Cocks and the plaintiffs in the second above-mentioned cause, under the security executed to them by Thomas Hawley, deceased.

By the Master's report, dated the 22nd of April 1839, it appeared, that in July 1827, a mortgage was executed by Hawley to Cocks (in consideration of

6,648l. 3s. 4d. paid by them to Hawley,) of the life estate of T. W. Richards in certain hereditaments, and also of three policies of assurance effected on the life of T. W. Richards, and granted to Hawley, for the sums of 5,000l., 2,500l., and 2,500l. And by the mortgage security Hawley covenanted, that he would pay the principal sum of 6,648l. 3s. 4d., together with interest for the same, after the rate of 5l. per cent. per annum, without any deduction or abatement for taxes or otherwise, at the respective times, and by the instalments therein mentioned; and that he would also, during the life of T. W. Richards, pay the premiums on the three several policies of assurance; and that, in case default should be made in payment of the said premiums, it should be lawful for Cocks & Co., at their option, to advance and pay such sum or sums of money as might be required for keeping on foot or renewing the same several policies, or any of them. And it was thereby expressly agreed, that the sum or sums that should be advanced as last aforesaid, should stand charged upon the same mortgaged premises, and should carry interest after the rate aforesaid, and be raised and recovered in like manner as the other monies thereby secured. Provided nevertheless, and it was thereby expressly agreed and declared, that the total amount of the monies secured, and to be ultimately recoverable by virtue of the mortgage security, (exclusive of the principal sums of 3,000l. and 2,000l. secured by the bonds of Hawley, in respect whereof the proper ad valorem stamp duties had been already paid,) should not exceed the sum of 3,000l. Cocks & Co., before the Master, claimed to have found due to them under their mortgage security, the principal sum of 6,648l. 3s. 4d., together with the sum of 3,417l. 17s. 7d. for interest thereon, from the date of their mortgage security, to the date of the order of reference, the sum of 3,075l. for money paid by them for premiums on the three policies, the sum of 744l. 14s. for interest on such premiums, and the sum of 287l. 17s. 10d. for costs and expenses paid by them, amounting altogether to the sum of 14,173l. 12s. 9d. The Master by his report stated, that he had investigated the claim of Cocks & Co. so far only as to satisfy himself that

a sum of money exceeding 8,000*l.* was due to them for principal money and premiums paid by them on the three policies of assurance; and that on the 20th of January 1832, the principal sum and the payments for such premiums amounted to 8,000*l.* and upwards. The Master then stated his opinion, that under the mortgage security Cocks & Co. were entitled to claim to the extent of 8,000*l.* only, (that being the amount covered by the stamp impressed on the mortgage security,) with interest at 5*l.* per cent. per annum, and allowed their claim to that extent only: he then found, that the principal sum of 6,648*l.* 3*s.* 4*d.* added to 3,417*l.*, the amount of interest due thereon to the 7th of November 1837, the date of the order of reference, and to 1,351*l.* 16*s.* 8*d.*, the amount allowed by him for premiums paid, with interest from the time each particular premium was paid, amounting to 497*l.* 14*s.* 6*d.*, made the total amount due to Cocks & Co. to be 11,915*l.* 12*s.* 1*d.*

Messrs. Cocks & Co. excepted to the Master's report, because he had not found, that there was due to them the sum of 14,173*l.* 12*s.* 9*d.*, or at all events a sum exceeding 11,915*l.* 12*s.* 1*d.*

The question for the consideration of the Court was, the proper construction of the restrictive clause contained in the mortgage security of Messrs. Cocks & Co. The mortgagees, Cocks & Co., claimed not only principal money to the extent of 8,000*l.*, but also other monies beyond that amount, consisting of premiums paid on the policies of assurance and interest thereon, amounting together with the 8,000*l.*, to the sum of 14,173*l.* 12*s.* 9*d.*; and they relied principally on the general power contained in the mortgage security, enabling them to reimburse themselves all costs and charges, and also on the provision therein also contained, that in case the mortgagees should pay the premiums on the policies, the sums so paid should stand charged on the mortgaged premises, and carry interest after the rate and be recovered in like manner as the other monies thereby secured; and it was insisted, that the premiums paid ought to be considered as payments made merely to keep alive the mortgage security, and that the Stamp Act did not at all affect the case before the Court. The Stamp

Act, (55 Geo. 3. c. 184.) title 'Mortgage,' which is referred to in his Lordship's judgment, was relied upon in the arguments in support of the Master's report.

Mr. Wigram and *Mr. Thompson* appeared in support of the exception taken by the mortgagees, Messrs. Cocks & Co.

Mr. Richards, *Mr. Bethell*, *Mr. Wray*, and *Mr. Bagshawe*, in support of the Master's report. The cases of

Doe d. Merchant v. Bragg, 3 Nev. & Per. 644; s. c. 7 Law J. Rep. (n.s.) Q.B. 263;

Halse v. Peters, 2 B. & Ad. 807; s. c. 1 Law J. Rep. (n.s.) K.B. 2;

Scott v. Allsopp, 2 Price, 20, were cited in the course of the arguments.

The LORD CHANCELLOR.—The order of reference in this case is, that the Master should inquire and report what was the amount then due to the petitioners Cocks and Biddulph, under the security executed to them by Hawley. The Master, no doubt, under that, was drawn into the consideration of law and equity and fact, so long as it affected the amount of the demand. It appears by the Master's report, that the contract between the parties, upon which the Master was directed to ascertain the amount due, was to secure the sum of 6,648*l.* and interest thereon.—[Here his Lordship read the material part of the mortgage security stated in the Master's report.] Now, it has been very truly observed in argument, that these monies were rather for the purpose, indeed entirely for the purpose of keeping alive the security, and not for the purpose of adding to the loan. But, although that may be the nature of the advance, and although a court of equity may deal with it in that view, if the parties have not contracted themselves out of that equity, the question is, whether they have not by express contract brought themselves within the exception to that rule. The contract is, that if the covenantor, i. e. the debtor, does not pay the premium, and keep up the policies—which he has not done—why then the bankers at their option may keep up the same, and what they shall so pay shall stand and be charged upon the mortgaged premises, and carry interest, and be raised and recovered in like manner as other monies

thereby secured, provided however that the whole together shall not exceed the sum of 8,000*l.* Now, the Master had this before him, and he found a certain sum was due for money lent; and that, besides that sum, which does not reach the whole amount of 8,000*l.*, there was a certain sum of money paid by these bankers on account of the premiums; and taking so much as was paid on account of the premiums as made up 8,000*l.*, he finds the whole sum of 8,000*l.* is due: that is to say, he finds the whole due, which by contract these parties had between themselves covenanted should be the ultimate amount of charge on the property. That is one view of the case which the Master had presented to him. The other view of the case which the Master had presented to him was, that there was no stamp on this deed to cover more than 8,000*l.*, and the provision in the Stamp Act is, that for an unlimited amount there must be a stamp duty paid of 25*l.* If the amount be limited, then an *ad valorem* duty must be paid, and the clause in the Stamp Act imposing that duty, contains the following words of exception: "other than and except any sum or sums of money to be advanced for the insurance of any property, comprised in such mortgage or security, against damage by fire, or to be advanced for the insurance of any life or lives pursuant to any agreement, or any deed whereby any annuity shall be granted or secured for such life or lives." The act therefore in a certain case (why the exception was made, and why it was not extended to the present case, it is not necessary to inquire,) does contemplate the payment of money to keep alive insurances on lives; and it says, that if there be an annuity, and the premium is paid to keep alive the policy given to secure the annuity or the subject-matter, then that shall not be included in the amount,—obviously assuming that if the premium was for any other purpose, or paid for any other insurance, it would be included in the amount. Then came the case of *Halse v. Peters*, which has been referred to in the argument, in which that point expressly arose; and it was held, that where there was a covenant to pay the premium, and the amount was not limited, the deed was liable to 25*l.* duty. The

only way of keeping it within the act, and subjecting it to a more limited duty, is, to stipulate the amount for which the premium is to be paid. In that case it was held, that the limit must be expressed on the face of the deed, and that a mortgage for 1,500*l.*, with covenants for payment of the quarterly premiums, and other costs and charges of an insurance of 1,000*l.*, upon a particular life for seven years required a 25*l.* stamp; and from that we see the reason why this special provision was included in this deed: it was in order to save the difference between 25*l.* and a smaller amount of duty; and in saving that, the parties have in fact lost their security to a very great amount. It is provided therefore, in order to come within the rule, that the total shall not exceed 8,000*l.*, being the debt, interest, and premiums. It is unfortunate, but I do not see how it is possible to say the Master has come to an erroneous conclusion. I think the parties have by their contract bound themselves to limit their demand upon the security, which was what the Master had to inquire into, viz. to 8,000*l.*, and the stamp duty would of itself have compelled the Master to come to that conclusion. The question is, whether the Master could have come to any other conclusion, upon the reference, than that which he did come to. I think he could not, and therefore the exception must be overruled; and as the fund is a deficient one, the creditors cannot be prejudiced by directing the costs to be costs in the cause.

L.C.

March 25;

June 25;

July 21, 22.

LINCOLN V. WRIGHT.

LINCOLN V. DEUBERY.

Practice. — Irregularity — Pleading — Commission — Interrogatories — Acquiescence — Next Friend — Costs — Indictment.

Depositions were taken on the part of plaintiffs in a cause, in which it was alleged that J. K. was a plaintiff, as next friend to other plaintiffs who were infants, whereas the fact was, that J. K. was then dead. The defendants joined in the commission for the examination of witnesses, but made no objection to the alleged irregularity till after

publication had passed. On application by the defendants to suppress the depositions taken on the part of the plaintiffs, the Court refused the motion.

In a cause, the order for a commission for the examination of witnesses, the commission itself, and the return to the commission, corresponded with one another in naming L. as a defendant, but in the title to the interrogatories, L's name was omitted (he having been dismissed from the suit between the time when service of the order for the commission was made on the defendants, and the service of subpoena to hear judgment), and the name of J. K., a deceased next friend of the plaintiffs, was mentioned in the title to the interrogatories of both plaintiffs and defendants, as if living. Motion on behalf of defendants to suppress the depositions taken on the part of the plaintiffs, refused.

Interrogatories ought not to be suggestive of the answer to be given; and they are improper if, in suggesting the subject, they are capable of being answered negatively or affirmatively, without being accompanied by circumstances.

Semble—An interrogatory commencing—"Was it so agreed that," &c. is not improper, not being suggestive of the answer.

This was an application on behalf of two of the defendants, John Rust and Hugh Bougher, that the depositions of the witnesses taken in these causes on behalf of the plaintiffs, might be suppressed, with costs.

The plaintiffs filed a replication to the answers of the defendants on the 1st of September 1840, served subpoenas to rejoin on the 4th of September 1840, and on the same day obtained an order for a commission for the examination of witnesses, which was served on the 8th of September 1840, and which was entitled as follows:—"Between William Lincoln and others, plaintiffs, Smith, Wright, and others, defendants; and between William Lincoln and others, plaintiffs, John Henry Druery, and others, defendants."

On the 5th of October 1840, the plaintiffs obtained an order, dismissing the bill against the defendant Lincoln, and which was entitled as follows:—"Between William Lincoln, and others, plaintiffs, J. A. Lincoln, the elder, and others, defendants, by original and supplemental bills."

On the same day the plaintiffs obtained the usual order for leave to examine the defendant Wright as a witness for plaintiffs, which was entitled in the same way as the last-mentioned order.

On the 26th of October 1840, the plaintiffs obtained an order appointing a new next friend to the infant plaintiffs King, in the room of James King, deceased, the title whereof was as follows:—"Between William Lincoln, and others, plaintiffs, Smith, Wright, and others, defendants; and between William Lincoln, and others, plaintiffs, John Henry Druery, and others, defendants, by original and supplemental bills."

On the 26th of December 1840, the plaintiffs served subpoenas to hear judgment returnable on the 11th of January 1841. The plaintiff James King died on the 8th of December 1839, but his name appeared in the title to the plaintiffs' interrogatories as if living; and the interrogatories were exhibited by the plaintiffs on the 23rd of October 1840, under a commission issued on the 30th of September previously, and omitted the name of the defendant J. A. Lincoln in the title, and J. A. Lincoln was a defendant to the original bill, and also to the bill of supplement, but the order dismissing him was entitled in one cause only. The interrogatories, to which objections were taken on account of their forms, commenced with asking, "whether it was agreed," &c.—"did any person give any, and what, directions?" &c.

The case was argued before the Master of the Rolls on the 25th of March 1841, when the following cases were cited—

Pritchard v. Foulkes, 2 Beav. 133; s.c. ante, 17.

Smith's Chancery Practice, vol. 1. c. 34, 'Suppression of Depositions,' and cases there cited.

White v. Taylor, 2 Vern. 435.

Ingram v. Mitchell, 5 Ves. 297.

Perry v. Sylvester, Jac. 83.

Curre v. Bowyer, 3 Swanst. 357.

On the 25th of June 1841, his Lordship delivered the following judgment:—"The first ground of objection stated was, that the depositions were taken in a cause in which it was alleged that

James King was a plaintiff and next friend to other plaintiffs, who were infants. It appears that the name of James King, after he was dead, was continued on the record as a plaintiff and as next friend to the other plaintiffs, who were infants. This irregularity was however known to, and acquiesced in by the defendants, who joined in the commission to examine witnesses, and made no complaint till after publication had passed. It does not appear to me that parties who have so proceeded ought, after publication, to be allowed to suppress depositions on this ground.

The other irregularities which were insisted upon, relate partly to the title of the interrogatories, and partly to the proceedings in the cause, during the execution of the commission. The order for the commission, the commission itself, and the return to the commission, are all in the usual form, and correspond with one another. The title of the interrogatories is not inconsistent with the title of the order, the commission, and the return; but, expressing the name of the parties at full length, it contains the error I have already adverted to, in naming James King, after he was dead, as plaintiff and next friend to other plaintiffs, who are infants. This was wrong; but not only had the error been acquiesced in by the defendants in all the preceding stages of the cause, but was actually committed by the defendants themselves in the title to their own interrogatories. If the plaintiffs have been irregular in this respect, as I think they have, so also have the defendants; and under these circumstances I think one party ought not to be allowed to take an advantage of an irregularity common to both, to the prejudice of the other party.

As to the proceedings on the commission, it appears that while the commission was in course of execution, an order was obtained to substitute a next friend in the place of James King, who had died during the progress of the suit; and it is alleged this order, and the amendments consequential upon it, made all the subsequent proceedings under the commission irregular and void. On this part of the subject I thought it necessary to make some inquiry, and in the result it appears to me a proceeding

of this sort, the object and effect of which is in no way to alter the matter in issue between the parties, but only to render valid the proceedings filed in the name of infants, and does not make it necessary to obtain any further order to give validity to the proceedings under the commission.

The last objection to the depositions is, that they were taken under interrogatories which were leading; and they were said to be leading, on the ground that they asked the witnesses whether it was agreed to the effect suggested in the interrogatories. In the argument, it was contended the interrogatories ought to have asked, not simply "whether it was so agreed," but "whether it was or was not so agreed." Now, it has been held, that the interrogatories ought not to be in this form—"was it not so agreed?" that is considered to be leading; but the form—"was it so agreed?" does not appear to be suggestive of the answer. It is impossible to examine a witness without referring to or suggesting the subject on which he is to answer. If the question suggests a particular answer, it is leading and improper. Questions have also been held to be improper, if, in suggesting the subject, they are capable of being answered negatively or affirmatively, without any circumstances; but a question whether such an event did happen, does not suggest the answer that it did happen; and the interrogatories in this case are not capable of being answered in the affirmative or negative without circumstances; and I am therefore of opinion they are not leading. This motion must therefore be refused, and refused with costs.

The defendants having appealed from the order of the Master of the Rolls—

Mr. Girdlestone and *Mr. Steere* appeared in support of the appeal.—After stating the facts of the case, it was argued, on behalf of the appellants, that the only question for the consideration of the Court was, whether perjury could be assigned on the depositions that had been taken on behalf of the plaintiffs; and it was contended, that the cause was not identified with the interrogatories, the title to which varied from the title to the commission and to the

depositions; and although James King had no interest in the subject-matter of the suit, that could not be taken into consideration in a court of common law; that there ought to have been a renewed commission issued after J. A. Lincoln had been dismissed from the suit; that, as regarded acquiescence, the objection made by us cannot be waived by acquiescence, an indictment for perjury being a proceeding at the suit of the Crown; that the plaintiffs having filed a replication, representing James King as living, the defendants had no alternative but to entitle their interrogatories as if such were the fact; and the Court could not receive the evidence in a cause where the most trifling objections thereto existed, especially where infants were parties—

Shaw v. Lindsey, 15 Ves. 380.

White v. Taylor, 2 Vern. 435.

Roberts v. Millechamp, 1 Dick. 22.

That the Court might have given permission to the plaintiffs to re-examine their witnesses if it had chosen so to do—*Curre v. Bowyer*, *Pritchard v. Foulkes*. Supposing, however, the title to the commission issued could be expanded, so as to coincide with the title to the interrogatories, still the depositions were irregular, on account of the order obtained for the substitution of the new next friend, and that was an objection that could not be waived, because it was an objection to the evidence itself. Then with reference to the form of the interrogatories, the Court below has taken upon itself to decide that question, instead of referring the consideration of it to the Master; the interrogatories complained of in the present case were framed in the affirmative, and not in the alternative, and were full of suggestions to the witnesses, inviting them to give affirmative answers, and comprising the words "agreed," "as executors and trustees," &c. The fifth interrogatory commenced thus—"Did any person or persons give any, and what, directions," &c.

Mr. J. Wigram and *Mr. Jeremy*, contra. —The commission was regular, and properly entitled, as the Master of the Rolls, after making inquiries from the proper

sources determined; and the objection raised is of a trifling and technical nature, and ought not to be countenanced. In *Curre v. Bowyer*, the Court ordered the witnesses to be re-sworn, and not to be re-examined; and it matters not whether there be a next friend to a suit, or not, on behalf of infants, who are parties, except for the purpose of answering any order for payment of costs; but suppose the next friend during the progress of a suit dies, and a new friend is appointed by an order of the Court, surely an indictment could be sustained in such a case against the witnesses in the cause. The sole question, however, in this case is this—can the cause be satisfactorily identified with the depositions? If it can, then nothing further is requisite. As regards the strictness required in pleading, it appears from the cases of *The King v. Roper* (1), and *The King v. Benson* (2), that identity must be proved often by other means than the title to the cause, although that is not allowed where there is doubt about the identity; the cases of *Shaw v. Lindsey*, *White v. Taylor*, and *Robert v. Millechamp*, are cases of that kind. The record is altered by orders of the Court, as well by appointing a new next friend as by striking out of the record the name of J. A. Lincoln; and it is sufficient if the record itself, or orders of the Court, explain the changes that have arisen in the cause during its progress to a hearing.

His Lordship having stated that in case the other objections did not succeed, he should not take on himself the duty of the Master, and determine whether the interrogatories were or were not leading, *Mr. Wigram* did not proceed to argue that part of the case relating to the interrogatories.

THE LORD CHANCELLOR.—The irregularity in the supplemental suit is not of such a character as to entitle the parties moving to have the application granted them. There can be no perjury committed unless a suit is actually pending, and the oath is administered in that suit. — Now

(1) 1 Stark. 518.

(2) 2 Campb. 508.

James King was the next friend to the infant plaintiffs, and he died before the supplemental bill was filed, which takes no notice of that fact, and it is therefore said, there was no suit pending, and therefore no perjury could be assigned; but the suit is pending, because James King stood only in the character of next friend to the infant plaintiffs, who were before the Court, and therefore James King was no party to the cause. It is then said there was another party against whom the bill had been dismissed, but that was done by an order of the Court, and in the title to the interrogatories his name was accordingly omitted. The interrogatories therefore in their title correctly represent the pending litigation, and the error complained of I do not consider material. The case of *The King v. Benson* goes further than the present case, for there the indictment stated that the bill was filed against Benson and another, when, in fact, the bill was filed against Benson, Davies, and the Attorney General; so that in reality there was in that case no such litigation as described in the indictment, and still the Court held that there was no fatal variance. On these grounds, then, the present application wholly fails. It is quite another question whether the Court would, on a proper application being made to it, order a new next friend to be substituted for the one deceased, to protect the other parties to the suit, as to the payment of their costs; but that has nothing to do with the substance of the present application. *Pritchard v. Foulkes* furnishes this observation, that in that case the interrogatories and depositions of the witnesses were only entitled in one of two causes, whilst the order for the commission for the examination of the witnesses was entitled in both causes. On the other point, whether the interrogatories are leading or not, I express no opinion whatever, and the point must be determined elsewhere.

On the question of costs, his Lordship said it was for the interest of the suitors of the court that costs should follow the result of the application, unless there were good grounds shewn of exception.

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| M.R. | } DUNCAN v. M'CALMONT. |
| Nov. 13, 14, | |
| 1840. | |
| Feb. 22, 1841. | |
| L.C. | |
| Mar. 24, 26; | |
| Aug. 3. | |

Injunction — Concurrent Jurisdiction — Admiralty Court.

A bottomry bond had been given by the master of a ship for repairs, under circumstances which, as the owners of the cargo insisted, rendered the transaction of a fraudulent character. The ship had been taken in arrest upon its arrival in England, under a warrant issued by the Court of Admiralty, founded upon the bond, and bail had been put in by the owners of the cargo.

The Court, being of opinion that the matters in dispute could be more effectually and satisfactorily investigated in the Court of Chancery than in the Admiralty Court, granted an injunction, upon the application of the owners of the cargo, to restrain the holders of the bond from proceeding with their suit in the Admiralty Court.

In 1839, Messrs. Benson & Co., of London, sent a vessel belonging to them, and called the *Lord Cochrane*, to the island of Ascension, under the command of L. H. Smith. She then proceeded to Pernambuco, where she discharged the remainder of her cargo, and was taken charge of by Messrs. M'Calmont & Co., as the agents of Messrs. Benson & Co., who advertised her as a ship ready to take in goods on freight for Liverpool. Having obtained a cargo, a great part of which belonged to the plaintiffs, and part to M'Calmont & Co., the ship sailed on the 29th of June 1839, but on the same day struck on a sand bank, and was compelled to return to Pernambuco for repairs. The cargo was discharged, and the ship was repaired, but it did not clearly appear whether these repairs were made under the direction of Messrs. M'Calmont & Co., or of the master of the ship (Smith), or of Lloyd's agent. She was not ready to sail homeward till the 11th of January 1840. On the 6th of January 1840, Smith, the master, executed a bottomry bond to M'Cal-

mont & Co. for the payment of 8,558*l.* 12*s.* 4*d.*, which sum was made up of 7,132*l.* 3*s.* 8*d.*, the expense of the repairs, and 20*l.* per cent. premium on that sum; and the ship, freight, and cargo were bound for the payment of this sum, which was to be paid within twenty days after the arrival of the vessel at Liverpool. The bottomry bond was indorsed and remitted by M'Calmont & Co. to their agents at Liverpool, M'Calmont, Brothers, & Co., who, on the 19th of March, the day before the vessel arrived, obtained from the High Court of Admiralty a warrant for the arrest of the ship, freight, and cargo, founded on the bond.

Messrs. Benson & Co. abandoned the vessel to the underwriters. The plaintiffs, the owners of the greater part of the cargo, then gave bail in the Admiralty Court, according to the value of their respective cargoes, which bail amounted to 7,500*l.*, and obtained the discharge of the goods from the arrest. The ship was afterwards sold under an order of the Admiralty Court, for 1,675*l.*, and that sum, together with freight, amounting to 1,686*l.* 18*s.*, had been paid into court; but the freight on such part of the cargo as belonged to M'Calmont & Co. had not been paid into court. The vessel had been in constant service for about thirty years, and had been insured before she proceeded to Pernambuco for 4,000*l.*

The plaintiffs then filed their bill against M'Calmont, Brothers, & Co., Benson & Co., and Smith.

The bill prayed a declaration that the bottomry bond was fraudulent, and void as against the plaintiffs; or otherwise that an account might be taken of the monies properly expended in the repairs of the vessel, or otherwise justly due upon the security of the bond, and of the produce of the outward and homeward freight of the vessel, and of the sale of her; and that those funds might be first applied in satisfaction of the bond, the plaintiffs offering to pay what should be found due from them on account of freight for their part of the cargo; and for an injunction to restrain M'Calmont & Co. from prosecuting the action or suit in the Admiralty Court, and from instituting any other proceedings in that court respecting these matters.

The plaintiffs now applied for an injunction.

Mr. Pemberton, Mr. S. Sharpe, and Mr. Rolt, appeared for the plaintiffs; and

Mr. Kindersley, Mr. George Turner, Mr. Roupell, and Mr. Hull, for the defendants.

For the plaintiffs it was insisted, that there was strong suspicion of fraud on the part of the owners of the ship, from their having expended upon the repairs of the ship a much larger sum than she had been insured for, and than she had been sold for afterwards; that the captain had many opportunities of forwarding the cargo by other vessels; and that he, or the agents at Pernambuco, were not justified in incurring so great an expense in repairs; and that the Court of Admiralty could not investigate the matters so effectually as the Court of Chancery.

On behalf of the defendants it was contended, that the repairs were done under the sanction of the agent for Lloyd's, and that the expense could not be avoided; and that as the matter was now before the Court of Admiralty, there was no occasion for the interference of the Court of Chancery.

The following authorities were referred to:—

Glascott v. Lang, 3 Myl. & Cr. 451.

The Tartar, 1 Hag. Adm. R. 1.

La Ysabel, 1 Dod. 273.

The Augusta, Ibid. 285.

Ville de Varsovie, 2 Dod. 174.

The Aurora, 3 Rob. 133.

The Guardian, Ibid. 93.

Feb. 22, 1841.—The MASTER OF THE ROLLS (after stating the case).—For the plaintiffs it is alleged, that the mere circumstance of a bond for 8,558*l.* 12*s.* 6*d.* being given for the repairs of the ship at Pernambuco, which ship, on its voyage from England, had, together with its tackle, apparel, and stores, been insured for only 4,500*l.*, and which ship, after the repairs and a single voyage from Pernambuco to Liverpool, was actually sold for only 1,675*l.*, is of itself evidence either of fraud or of such improvident conduct that the circumstances ought to be investigated before any payment is enforced. There are in the bill various charges of facts and circumstances tending to shew either that a

fraud was wilfully committed, or at least that there was such an entire neglect of the interest of the owners of the cargo, and such an absence of all necessity for resorting to a bottomry bond affecting the cargo, that the plaintiffs, as owners of the goods, ought not to be held liable for the bond.

The answer denies the truth of most, if not all of these charges; and undoubtedly if this case were to be decided merely upon the facts stated or admitted in the answer, the plaintiffs would not be entitled to the decree which they ask. But the circumstances require information, and, in the absence of such explanation as may possibly be hereafter afforded, give rise to very strong suspicion. There seems great reason to believe that the ship was insured by the owners for more than its worth, and that consequently the owners and their agent, the master, had no interest to see that unnecessary repairs were not incurred; and after making allowance for part of the expense being incurred, not in repairing the ship, but in taking care of the cargo, the expenditure, whether considered with reference to the insured value of the ship, or the value as realized by the subsequent sale, appears to be such as could scarcely be incurred by a prudent management of the business. M'Calmont & Co. having acted as agents of the ship by the authority of the master, given him by the owners, may be considered as the agents of the owners; and it would be extraordinary if the owners, having insured the ship for more than its value, could get it repaired at an expense beyond the value of the ship and freight, and throw the excess upon the owners of the cargo.

It is said the shippers must have seen the repairs going on, but it does not appear that any notice was given to them that the cargo was in any way liable to repairs. How the facts may really stand must depend upon evidence to be hereafter adduced; but I am of opinion, that upon the statement made by the affidavits and in the pleadings, there is sufficient to shew that the plaintiffs are entitled to have this case investigated in a court of equity; and, this Court having jurisdiction to give relief on bottomry bonds, which have been improperly obtained, the only question is, whether the jurisdiction ought to be exer-

cised after such proceedings as have already taken place in the Court of Admiralty.

Before the bill was filed, the cargo had been arrested, and afterwards released on putting in bail to the amount of 7,500*l.* under the authority of the Court of Admiralty. An act on petition had been brought by the defendants on the requisition of the plaintiffs. The ship was ordered to be sold, and the freight on the goods of the plaintiffs was ordered to be brought into court. The defendants, M'Calmont, Brothers, & Co., as consignees of M'Calmont & Co., retained possession of their goods, without giving any bail, and the freight payable on their goods had not been paid into the Court of Admiralty. The plaintiffs, moreover, claim to have the outward freight of the ship, together with the homeward freight, and the proceeds of the ship, applied in reduction of what, if anything, is really due on the bond, before the cargo is resorted to; and the outward freight was received by the owners, and there is no proceeding in the Admiralty Court in respect thereof.

The first question to be tried is, whether the bond was valid; and if so, what is the amount payable upon it? Supposing the bond to be valid, the object will be to realize and apply all the funds which ought to be applied in reduction of the claim before the cargo is resorted to, including the freight payable on the goods shipped to M'Calmont, Brothers, & Co., and, as the plaintiffs contend, the outward freight; secondly, to apportion the sum which may remain payable on the cargo between and among the goods of the plaintiffs, in respect of which they have given bail to the amount of 7,500*l.*, and the goods which were consigned to, and have been reserved by M'Calmont, Brothers, & Co., but in respect of which no security has been given. These are objects which this Court has power to effect, if it should in the result of this cause appear to be just to do so. On the other hand, the Court of Admiralty has jurisdiction to decide whether the bond is valid or not; and if the bond be valid, to ascertain, by reference to the registrar and merchants, what sum is justly payable in respect of it. The Court of Admiralty can well deal with the purchase-money which it has, and with the freight

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on the plaintiffs' goods which it has, and also with the value of the plaintiffs' goods for which bail has been given; and I apprehend that it is not powerless with respect to the freight of the goods consigned to M'Calmont, Brothers, & Co., or even with respect to the outward cargo, because the Court may refuse to give M'Calmont, Brothers, & Co., who are the actors, any relief, unless they consent to do what is just and equitable on their part, and take all necessary steps to bring all proper parties before the Court, and raise all such questions as are necessary to enable the Court to do complete justice to the parties who are sought to be charged: but still it does not appear to me that the Court of Admiralty can so conveniently, directly, and effectually, as this Court can, compel the defendants to do all that is necessary for the full and satisfactory investigation and determination of the rights of these parties.

Nothing was done towards determining the rights of the party in the Admiralty Court before the filing of this bill. The defendants had obtained bail for the amount of the plaintiffs' goods; the amount of freight on the plaintiffs' goods had been brought into court; a commission had issued for the sale of the ship, and although the ship had been sold, the commission was not returned. The defendants' act on petition was brought in in May, but nothing had been done upon it; and it is therefore evident that the proceedings in the Admiralty Court are not now in a state so effective for the investigation of the matters in question, as the proceedings in this court, even in this early stage of them, now are. It is true, that the proceeding by act on petition was adopted at the instance of the plaintiffs, but this was long before it appeared that the value of the ship was so much less than might have been reasonably expected; and at this time the only proceeding is by act on petition, which Sir William Scott describes as a summary mode of proceeding, in which the parties put their respective cases briefly, and support their statement by affidavits,—a form convenient enough in matters of slight interest, and not of very delicate investigation.

Conceiving that, upon a proper case

being made out, and on certain terms, the form of proceeding in the Court of Admiralty might even now be altered and made more effective for the investigation of such a case as this, it is, I think, sufficient for me to say, that the proceeding in the form now adopted, cannot be well adapted to a case which appears to me to require evidence, which it might be wholly impossible to obtain upon affidavit. It was suggested, that a difficulty might arise in consequence of the money being paid into, and the bail being given under the authority of, the Admiralty Court. But on this point it does not seem to me that any doubt ought to be entertained. In the case before Sir William Scott, when he refused to exercise the jurisdiction in a question of property, he expressed himself thus (1): "It is a case entirely proper for the discussion of other courts, to which this court (that is, the Court of Admiralty) will undoubtedly be auxiliary in handing over the property, as soon as it is determined in whom it legally resides, if the use of its process can be deemed serviceable to justice, by carrying their judgment on that point into direct execution." And I can scarcely conceive a case in which any Court, in the exercise of its own jurisdiction, would have reluctance to assist any other court in the administration of justice.

Upon the whole, therefore, this being a case in which it appears to me that the transaction ought to be satisfactorily investigated before the plaintiffs are compelled to pay what may be due from them on the bond, this Court having jurisdiction over the subject-matter, and having the means of completely investigating and of effectually doing justice between the parties, the proceeding in the Admiralty Court being at this time in such a state, that whatever power there may be to adopt a different course of proceeding, the investigation, as the matter now stands, cannot be satisfactorily conducted, and there being equities, the administration of which can be satisfactorily secured in this court only, I am of opinion, that the injunction asked for must be granted.

His Lordship therefore granted the injunction; the plaintiffs consenting that the

(1) 3 Rob. 94.

bail, which had been given by them, should be available to secure the payment of any money which should be found due from them in this suit.

The defendants appealed from this decision, and the case was argued before the Lord Chancellor, on the 24th and 26th of March, by—

Mr. Wigram, Mr. George Turner, and Mr. Roupell, for the appellants; and—

Mr. G. Richards and Mr. Rolt, for the plaintiffs.

On the 3rd of August, the LORD CHANCELLOR gave judgment in the case, and affirmed the decree of the Master of the Rolls, except so far as related to the undertaking of the plaintiffs, that the bail given in the Court of Admiralty, should be answerable for any sum that might be found due from the plaintiffs in the prosecution of this suit. And his Lordship ordered that the plaintiffs should give security, to be approved of by the Master of this Court for the vacation, in the sum of 7,500*l.*, to answer what might be found due from the plaintiffs; the plaintiffs to carry in proposals before the said Master for such security, within a week after the order passed and entered, and to proceed with the said reference with due diligence.

V.C. }
May 28. } TAYLOR v. MARTINDALE.

Legacy — Annuity for ever — Heir or Executor.

Bequest of an annuity to A. for ever. A. survived the testator, and died intestate:— Held, that such a construction should be given to the limitation as would be most beneficial to the legatee; and that it was more beneficial to the legatee to declare the annuity to be given to his executors, administrators, and assigns absolutely, than to his heirs for ever.

James Howe, by his will, made in 1819, bequeathed several annuities and the residue of his property, in the following words: "I will, devise, and bequeath after all debts are paid, all the worldly property I die possessed of, wheresoever and what-

soever [describing the same more particularly] to my beloved wife, Sophia Howe, subject only to the hereafter written and following bequests:—to my beloved wife Sophia Howe's dearly beloved sister 50*l.* a-year for her life, and at her death to be equally divided between her son George Cheesman, my dearly beloved wife Sophia Howe, her own nephew, and Augustus Howe, my own nephew, son of my beloved brother, 25*l.* a-year to each for ever, and to my own dearly beloved brother 50*l.* a-year for ever." The testator died in 1824. The annuity of 50*l.* a-year was paid to W. Howe, his brother, until the death of the annuitant, intestate, in 1837. The question then arose, whether the annuity, assuming it to be perpetual, was payable to the heir-at-law or personal representative of W. Howe.

Mr. K. Bruce, Mr. Simpson, Mr. G. Richards, Mr. Bichner, Mr. L. Wigram, Mr. Tripp, and Mr. Warburton, for the different parties.

The cases of—

Turner v. Turner, Amb*l.* 776; s. c. 1 Bro. C.C. 316;

Earl of Stafford v. Buckley, 2 Ves. sen. 171,
were referred to.

The VICE CHANCELLOR.—This point is singular, and does not appear to have been decided by any of the cases. There is no doubt, that though a personal thing, an annuity may be granted to A. and his heirs. The description of an annuity, with its legal incidents, is thus given by Lord Coke (1): "An annuity is a yearly payment of a certain sum of money, granted to another in fee for life or years, charging the person of the grantor only. But not only the grantee, but his heir, and his and their grantee also, shall have a writ of annuity." And Lord Loughborough, in his judgment in the case of *Turner v. Turner*, says, "An annuity, when granted with words of inheritance, is descendable, but as to its security is personal only, may be granted in fee,—of course [it may] as a qualified fee, or conditional fee, but it is not entailable (2)." The testator in this case has merely said "for ever," and has not used the word "heirs." I find nothing

(1) Co. Litt. 144, b.

(2) Amb*l.* 782, 783; 1 Bro. C.C. 325.

which should lead me to construe the expression, "for ever," so as to make it signify "heirs," the subject of the gift not being necessarily real estate. It appears to me the question is, what construction is most beneficial to the legatee. In my opinion, it is more beneficial to the legatee, that the words "for ever" should be taken as a limitation to his executors, rather than to his heirs; he might die without heirs, and leave executors or administrators. The words are these:—"To my dearly beloved brother 50*l.* a-year for ever." I do not think it is a necessary construction to take these words as an equivalent to the expression, "to his heirs for ever." I think, on the contrary, that the better construction is, to hold it to be equivalent to the words, "to his executors, administrators, and assigns for ever." They, of course, take absolutely. I was certainly astonished at hearing some of the arguments which were addressed to me in this case, concerning annuities, when I recollect the description which *Blackstone* gives of an annuity, as being merely a personal thing (3).

L.C. }
June 11. } In re FORSTER.

Will—Construction—Legacy.

A testator, after giving 2,000*l.* to his daughter, directed that she should let her said legacy remain in the hands of his executors (his three sons,) until she should marry; and he charged the payment of it upon his real estate, which he devised to his three sons. All the three sons died, having devised their property to parties who became bankrupts:—*Held*, (affirming the decision of the Court of Review,) that the legacy was payable now out of the real estate, though the legatee was never married.

The particulars of this case, and the decision of Sir John Cross, will be found in 10 *Law J. Rep.* (N.S.) Bankr. 24. The assignees being dissatisfied with that decision, the question was brought before the Lord Chancellor upon a special case.

Mr. Wigram, Mr. Bethell, and Mr. Purvis, appeared for the assignees; and

Mr. Tinney, Mr. Swanston, and Mr. T. Clarke, for the legatee.

The following authorities were referred to:—

Roper on Legacies, vol. 1. p. 484; vol. 2. p. 553.

Powell on Devises, vol. 2. p. 284.

Thornhill v. Hall, 2 Cl. & Fin. 36.

Watkins v. Cheek, 2 Sim. & Stu. 199.

Murkin v. Phillipson, 3 Myl. & K. 257; s. c. 3 *Law J. Rep.* (N.S.) Chanc. 143.

Booth v. Booth, 4 Ves. 399.

The LORD CHANCELLOR affirmed the decision of the Court of Review, with costs.

L.C. }
March 20. } In re ANN MARROW.
June 29. }

Mortgage—Act 1 Will. 4. c. 60. s. 5—Mortgagee of Unsound Mind—Re-conveyance—Costs—Practice—Petition.

Where a mortgagee becomes of unsound mind, but is not found so by inquisition, the costs and expenses of an application by the mortgagee for a reconveyance on payment of the principal sum and interest due, must be paid by the mortgagor, and not out of the amount due to the mortgagee.

Quære the authority of *Ex parte Richards* (1). Such an application should not be made *ex parte*.

After an order made on petition has been drawn up, in accordance with the prayer, a new petition must be presented if the order made is sought to be varied.

In pursuance of a reference directed to the Master, on the application of the assignees of the mortgagor, under the act 1 Will. 4. c. 60. s. 5, he, by his report, found Ann Marrow a lunatic, or person of unsound mind, and that she was seised as mortgagee of certain freehold property for securing 600*l.* and interest, and there was due to her, for principal and interest, from the petitioners, as the assignees of the bankrupt mortgagor, the sum of 665*l.*, and that W. T. K. was the most proper person to be appointed, in the place of Ann Marrow, to receive the amount (he having

(3) 2 *Black. Com.* 40.

(1) 1 *Jac. & Walk.* 264.

given good security for the due application thereof), and also to re-convey the premises by mortgage. On the 19th of November 1840, the Lord Chancellor made an order *ex parte*, confirming the Master's report, and directing a conveyance to the petitioners of the mortgaged property, the petitioners to deduct from the principal sum and interest found due, the costs and expenses of the petitioners, incurred in and about the order of reference, and the proceedings consequent thereon, except the costs of the re-conveyance, which were directed to be paid by the petitioners. An application was afterwards made by *Mr. Mylne*, on behalf of *W. T. K.*, that the order so made might be varied, and that, instead of the costs and expenses attending the proceedings, &c. being directed to be paid out of the principal sum and interest found due to the mortgagee, the same might be ordered to be paid by the assignees of the bankrupt mortgagor, out of his estate; but it appearing that the order already made had been drawn up and passed, the application stood over for the presentation of a new petition in the matter.

A new petition having accordingly been presented, on the 29th of June 1841—

Mr. Mylne submitted that the order of his Lordship, as it had been drawn up, was erroneous as to the payment of the costs and expenses thereof, and consequential thereon, and of the petition; and that the assignees of the mortgagor, who sought the benefit to arise from the order, ought to pay the costs and expenses thereof; that the case was analogous to that of infant heirs of a mortgagee, where the costs and expenses of the order for a re-conveyance were borne by the mortgagor. The cases cited were—

Ex parte Richards, 1 Jac. & Walk. 264.

Ex parte Tytin, 3 Ves. & Bea. 149.

Ex parte Pearse, Turn. & Russ. 325.

Ex parte Cant, 10 Ves. 554.

It appeared that previously to the application being originally made to the Lord Chancellor, there had been an understanding between the respective solicitors of the two parties, that the whole of the costs of the petition, and the order, and consequential thereon, should be paid by the assignees, the friends of the lunatic mort-

gagee co-operating in the prosecution of the inquiries directed by the reference.

Mr. Spence, for the assignees, having assented to the existence of the understanding mentioned,—

The LORD CHANCELLOR said, that, if such were the state of the case, the principal question did not arise. His Lordship further observed, that he could not understand the case of *Ex parte Richards*, which appeared to create a distinction between the case of a lunatic who was a mere dry trustee, and the case of a lunatic mortgagee; and also added, that the original order ought not to have been made *ex parte*, the lunatic's interest being materially affected thereby. The order, as varied and finally drawn up, provided for the payment, out of the bankrupt's estate, of the costs of the former application, and of the application to vary the original order, and any other costs and expenses properly incurred in the matter relative to the said mortgage and the reconveyance of the estate.

M.R. }
July 13. } DORNFORD v. DORNFORD.

Will—Estate Tail in Money to be invested in Land—39 & 40 Geo. 3. c. 56.

Certain funds were brought into court, which had been directed by a testator to be invested in lands to be settled upon A. in tail, subject to the payment of an annuity. An order had been made upon a petition presented by A, that a sufficient sum to answer the annuity should be set apart, and that the residue of the fund should be paid to him:—Held, upon the death of the annuitant, that A. had elected to take the whole fund as money, thereby barring the entail, and that A's executors were entitled to the sum which had been set apart for the annuity.

A testator, by a codicil to his will, dated in May 1797, bequeathed a sum of 5,000*l.* to the plaintiff, James William Dornford, the eldest son of his eldest brother, to be disposed of according to the directions in his will, subject to the payment of an annuity of 50*l.* per annum to a lady during her life. The provisions in the will were

held by the Court, to direct that this money should be laid out in land, to be settled upon the plaintiff in tail. The testator died shortly afterwards.

In January 1807, the plaintiff presented a petition in the cause, by which he stated that he was desirous that certain payments should be made out of the funds in court, and that an appropriation should be made of 1,666*l.* 13*s.* 4*d.*, 3*l.* per cents., to meet the annuity of 50*l.*, and that he elected and was desirous that the residue should be paid to him in money; and he thereby prayed, that the necessary directions might be given for these purposes, and that upon the death of the annuitant, any person interested in the said 1,666*l.* 13*s.* 4*d.*, 3*l.* per cents., might be at liberty to apply to the Court respecting the same, as they should be advised. An order was made according to the prayer of the petition.

The plaintiff made his will in July 1811, and thereby referred to the funds in court, which had been appropriated to answer the annuity, and then continued, that in case he had power to dispose thereof by will, he wished that money to be equally divided among his brothers and sisters. He died soon afterwards, without having been married, and the annuitant died in March 1841.

A petition was now presented by the executors of the plaintiff, praying for a transfer to them of the 1,666*l.* 13*s.* 4*d.*

Mr. Pemberton and *Mr. Toller* appeared for the petitioners, and

Mr. G. Turner and *Mr. Ellison*, for *Josiah Dornford*, one of the defendants, who was named in the will as tenant in tail in remainder, expectant upon the decease of the plaintiff without issue. A question was raised, whether the petition of the plaintiff in 1807, and the order which was made upon it, operated to bar the entail; that the plaintiff elected to take the residue of the funds as money, and thereby barred the entail in that part: but that the interests of all parties in the funds which were set apart to answer the annuity, were not affected by that proceeding. The following cases were referred to:—

In re Lord Somerville, 2 Sim. & Stu. 470; s. c. 4 Law J. Rep. Chanc. 133.

In re Peyton, 5 Russ. 5.

The MASTER OF THE ROLLS said, that the annuity would have been a charge upon all the lands, if the money had been laid out in land; and that the disposition which had been made of the fund, was contrary to the directions of the will, and could not have been properly made, unless the plaintiff had been dealing with it as his own fund. He therefore thought the plaintiff had so dealt with the monies which were in court, as to have made an election to take them as money; and that the prayer of the petition must be granted.

Elght. Harpell 5729 Ch 163.

L.C. { BLEWITT v. ROBERTS.
Aug. 4. { BLEWITT v. STAUFFERS.

Will — Construction — Annuity — Joint Tenancy — Tenancy in common.

*A, by will, gave to B. an annuity of 600*l.* per annum, for life, but not to be liable to the controul of any husband, to be paid quarterly, from time to time, on her receipt only, &c., and after her death, the said annuity to be equally divided between six persons named in the will, or the survivors or survivor:—Held, that the five of such six persons who survived B. took an annuity of 600*l.* as tenants in common, and not as joint tenants, and were not entitled on A's death to receive a sum of money that would be sufficient to raise the annuity of 600*l.**

The cause came on to be heard before his Honour the Vice Chancellor on the 17th of March 1840, and one question was as to the proper construction of the following clause contained in the will of Edward Blewitt, viz.—

"I give to my said wife, Rachael Blewitt, 600*l.* per annum, for her life, but not to be liable to the controul of any future husband, but to be paid quarterly, from time to time, to her, on her receipt only, and not to be subject to any debts, or assignments; and after her death the said annuity to be equally divided between Ann Rogers Blewitt (afterwards Stauffers), Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, or the survivors or survivor."

Henry Blewitt died during the lifetime of Rachael Blewitt, and Oscar Blewitt

survived Rachael Blewitt, but died shortly after her.

His Honour decided, that so much money as was sufficient, by the interest thereof, to raise the annual sum of 600*l.* became absolutely divisible in equal shares amongst A. R. Stauffers, Thomas Rogers Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, as the survivors of the six persons named in the will; and that Henry Blewitt's share became vested in his five surviving brothers and sisters, as joint tenants.

The plaintiff, Reginald James Blewitt, appealed from his Honour's decision.

Mr. J. Wigram and *Mr. Macdonnell*, in support of the appeal, cited—

Savory v. Dyer, Dick. 162; s. c. Ambl. 70.

Naylor v. Winch, 1 Sim. & St. 555; s. c. 2 Law J. Rep. Chanc. 132.

Jones v. Randall, 1 Jac. & Walk. 100.

Mr. Jacob, *Mr. Girdlestone*, *Mr. G. Richards*, and *Mr. Loftus Wigram*, for the respondents, cited—

Ellon v. Shephard, 1 Bro. C.C. 532.

Stretch v. Watkins, 1 Mad. 253.

Clough v. Wynne, 2 Mad. 188.

THE LORD CHANCELLOR.—The first gift is 600*l.* per annum to the testator's wife for her life, and after her death the said annuity to be equally divided between the six persons named, or the survivors or survivor. The Vice Chancellor has decided that the six persons are entitled, after the death of the widow, to so much three per cents. as would produce 600*l.* per annum. His Honour is made thus to express himself:—"I have always thought that if there be a gift simply of 100*l.* a year to A, it is a gift of a sum which shall be sufficient to produce 100*l.* a year." (1)

The cases that were referred to in argument before me do not appear to support that proposition. In the case of *Clough v. Wynne*, the gift was of the interest of the residue to A. for her life, and at her decease

the same to go to the plaintiff; and Sir Thomas Plumer held, that the gift of the interest in the residue, without limitation, was a gift to the plaintiff of the residue.

In *Stretch v. Watkins*, it was an unlimited gift of the produce of stock: a very different principle applies to that case, an unlimited gift of the produce of the stock necessarily exhausting the whole subject-matter.

In *Philipps v. Chamberlaine* (2), Lord Alvanley thought the terms used in the residuary clause were sufficient to carry the principal, as well as the interest. In *Rawlins v. Jennings* (3), Sir William Grant relied upon the expressions, shewing the intention to give the capital. These decisions are all founded upon the general principle, that where the gift of the produce of the fund is without limit as to time, it is impossible not to adopt the conclusion that the fund itself is given; but if the expressions are to be considered as limited as to time, such limit must be the measure of the gift. A gift of an annuity may be for any period of years; but, in the ordinary acceptation of the terms, if the gift amount to a gift of a positive annuity of 100*l.* a year, no doubt, the gift being an annuity to the donee for life, it is a gift of as many hundred pounds as the donee should live years.

In *Savory v. Dyer*, Lord Hardwicke says, "If one gives, by a will, an annuity not before existing, to A, A. shall have it only for life." In that case, the gift was during the life of B; and the question was, whether the annuity had ceased by the death of the annuitant, or was in operation during the life of B. It is singular that no other case has been referred to, in which the question distinctly arises; but in *Innes v. Mitchell* (4), there is a decision by Sir William Grant, in which the gift was not dissimilar to the present, although there were in that case provisions more strongly leading to an inference that the capital sum was intended to be given; the gift, in that case, was of an annuity for the use of A. and her children, to be paid out of the general effects of the testator, until it was convenient to the executors to invest

(1) Vide also his Honour's decision to that effect in *Tweedale v. Tweedale*, 9 Law J. Rep. (N.S.) Chanc. 147, which was adverted to by his Lordship in the judgment.

(2) 4 Ves. 51.

(3) 13 Ves. 39.

(4) 6 Ves. 464; s. c. on appeal, 9 Ves. 212.

5,000*l.* in the funds, in lieu thereof, for her and their use, and to the longest liver, subject to an equal division of the interest, whilst more than one was alive. Sir W. Grant, and Lord Eldon (on an appeal from the decision of Sir W. Grant), held, that the annuity determined with the life of the survivor. If the gift of an annuity of 100*l.* to A. is a clear gift of a sum sufficient to produce the 100*l.* a year, there was sufficient in the case of *Innes v. Mitchell* to give to the mother and her children a sum sufficient to produce the annuity of 100*l.* a year, without reference to the provision as to the sum of 5,000*l.*, mentioned in the will in that case; and yet, notwithstanding the provision as to the sum of 5,000*l.*, it was held there was no gift of that sum of money.

It has been stated, that it was the course of the Court to secure the annuity by investing a capital sum; but if a testator were minded to give 10,000*l.*, can it be supposed that he would set about his object to give 500*l.* a year to the legatee, without mentioning that the 10,000*l.* was to come out of the estate? I feel no disposition to question the doctrine laid down by Lord Hardwicke, and followed by Lord Eldon, in the cases I have referred to; and if I did, I should not (if I thought myself at liberty) depart from the rules established by such decisions. The petition of the plaintiff contains a claim on the part of the residuary legatee to the annuity given to Henry Blewitt, who died in the lifetime of the tenant for life; but it appears to me the five survivors took the whole 600*l.* per annum as *tenants in common*. The gift is to the mother for life, and after her death to the children, equally to be divided between them, or the survivor or survivors of them. The subject-matter of the gift is an annuity of 600*l.*, and the period of division was the death of the mother, and at that time there were but five children living.

For these reasons, it appears to me that the Vice Chancellor's decision must be reversed; and the costs, having been occasioned by the form of the gift contained in the will, must follow the usual course, and come out of the general estate.

M.R. }
July 14. } SMITH v. LYSTER.

Receiver — Practice — Infant Plaintiff — Dismissal of Bill.

A suit was instituted in the name and for the protection of two infants; and a receiver was appointed at their expense. A petition presented by one of them on attaining twenty-one, praying that the receiver might be discharged as to her share of the property in question, and the bill dismissed as against her, or that she might be indemnified against future expenses of the suit, was dismissed, with costs.

This bill was filed by two infants, by their next friend, against two persons who were tenants in common in tail, together with the infants, of certain estates. A decree was made in 1832, and a receiver appointed. The receiver was directed to pay one-fourth part of the net rents to each of the defendants; and the defendant Lyster was appointed guardian of the plaintiffs, with an allowance for their maintenance and education. The expense of the receiver was delayed out of the shares of the plaintiffs, in equal moieties.

Mary Wilson, one of the plaintiffs, attained twenty-one on the 27th of February 1841. The other plaintiff continued an infant. Mary Wilson now presented a petition, stating that she was desirous of being let into possession of the rents of her one-fourth of the estates, and of having the receiver discharged so far as respected her share; that the object of the suit, so far as related to the petitioner, having been effected, she was desirous of having the same dismissed so far as respected her interest therein, or else of being properly indemnified against any future expenses to which she might be rendered liable, by the same being further prosecuted in her name, as one of the co-plaintiffs; and it prayed accordingly, that the receiver might be discharged, and that the petitioner might be let into possession of her one-fourth, and that the suit, so far as related to her interest therein, might be dismissed, or else that she might be properly indemnified on the behalf of the plaintiff Smith, or his next friend, against any costs, charges or expenses, which she might be put unto or

incur, for or by reason of her name being continued or made use of as a co-plaintiff with Smith.

Mr. E. R. Daniel appeared in support of the petition, and

Mr. Leach for the defendant Smith.

The MASTER OF THE ROLLS said, that the suit was instituted for the benefit and protection of both the infants, and that the object of the suit was not effected until both the infants attained twenty-one; and his Lordship dismissed the petition, with costs.

V.C. }
May 31. } MOORE v. VINTEN.

Trust—Stat. 1 Will. 4. c. 60. ss. 8, 19, and 24—Husband and Wife—Trustee last seised—Evidence—Affidavit.

A woman, who was sole trustee for sale of real property, married a man who absconded and was not afterwards heard of, up to the hearing of the cause. The Court decreed a sale, and that the husband should be declared a trustee, within the stat. 11 Geo. 4. & 1 Will. 4. c. 60. s. 19; but refused to appoint a person to convey, in his own room, under sect. 8, the husband not being the trustee last known to have been seised, inasmuch as there was a joint seisin in the husband and wife.

Proof of search for a trustee, under the 24th sect. of the stat. 11 Geo. 4. & 1 Will. 4. c. 60, may be given at the hearing of the cause by affidavit.

K. Bridge, the testator, after giving a trifling legacy, and directing payment of his debts out of his real estates, in case his personalty should be deficient, and after appointing Esther Gregson, who was the daughter of his wife, J. Lee, and R. Blizard, executrix and executors of his will, gave, devised, and bequeathed all the residue of his real and personal estate unto and to the use of the said Esther Gregson, J. Lee, and R. Blizard, their heirs, executors, administrators, and assigns, according to the nature of the property, upon trust, to sell the same in such manner and at such times as they, or the survivors or

survivor of them should think fit, and after paying the expenses of the sale, upon trust to invest the produce in the funds, and pay the dividends to the testator's wife E. Bridge, for her life, and after her decease, upon trust, to stand possessed of the said funds and securities, and the dividends thereof, in trust for the testator's three children, Knight Bridge, Mary Moore, and Elizabeth Beeson, and for his wife's two children, Elizabeth Mills and the said Esther Gregson, in equal shares; and in case any of the said legatees should die without issue, in the lifetime of the tenant for life, his or her share to go to the others of them. Knight Bridge, the testator's son, died without issue in the testator's lifetime.

The testator died in January 1836. His widow remained in possession of the real estate, during her life, and died in August 1837. In February 1836, E. Bridge, the widow, alone proved the testator's will. The other executors did not renounce probate, but they never interfered in the testator's affairs, and they executed a deed of disclaimer of the trusts of the real estate. In July 1836, E. Bridge married Thomas Vinten, who, in December 1837, absconded, taking with him a considerable sum of money, part of the trust property, and had never since been heard of. It appeared that part of the testator's real estate, which consisted of several houses and gardens, had been sold since Mrs. Vinten's marriage, and that the money had been received by her husband. The object of the bill was to have the remainder of the property sold, and the produce secured for the legatees. The cause now came on for hearing, and in support of the case made by the bill, as to the absconding, continued absence, and impossibility of finding the husband, the wife's answer, and also an affidavit of search was tendered. The question was, what order could be made with reference to the execution of the trust for sale.

Mr. Wakefield and *Mr. Collyer*, for the plaintiff.—The husband, being a trustee within the 19th sect. of the 11 Geo. 4. & 1 Will. 4. c. 60, it is competent for the Court, under the 24th section, to receive proof, by affidavit, that the husband can-

not be found—*De Crespigny v. Kitson* (1).

[The VICE CHANCELLOR.—There is no doubt that the affidavit may be read for that purpose. The practice was settled in *De Crespigny v. Kitson*.]

Then the husband being a trustee within the meaning of the act, and it being unknown whether he be living or dead, the Court will appoint a person to convey in his room, under the 8th section; and will do so by the same decree, which declares him to be a trustee (2). That a person who is merely a trustee by operation of law, and who cannot be found, may be declared a trustee under the act, for the

(1) V.C. August 3, Dec. 11, 1840, not reported. The case was as follows:—By a settlement made upon the marriage of Sir W. De Crespigny and Dame Sarah, his wife, several sums of money were settled upon them for their lives, with remainder as they should appoint. Part of those sums was appointed to the petitioner, by deed, and another sum was afterwards bequeathed to him, by the will of Sir W. De Crespigny. The whole was settled on the marriage of the petitioner and his wife, for their benefit, and that of the children of the marriage. One of the trustees of the latter settlement was out of the jurisdiction, and could not be served with process, and the funds being ready to be paid to the trustees, a suit was instituted for the appointment of new trustees. The evidence of the absence of and inquiry for the trustee consisted of affidavits of that fact. The VICE CHANCELLOR, when the case was first mentioned, said, it was material also to produce the deed by which the absent person was appointed trustee.

Aug. 3, 1840.—*Mr. Bethell* and *Mr. Abraham*, for the plaintiffs, stated, that the trust-deed, appointing the absent party, and also the original settlement, were ready to be produced. The VICE CHANCELLOR thereupon made the order for the appointment of new trustees, and referred it to the Master for that purpose, and also to settle the deed of assignment.

Dec. 11, 1840, the Master, having approved of trustees, a petition was presented, praying that it might be referred to the same Master to settle the deeds necessary for assigning and vesting the trust funds in such new trustees; and that the said Master, or such other person as the Court should direct, might be appointed to execute the deeds in the place of the absent defendant. *Mr. Bethell* suggested that there might be a peculiarity in the circumstances, inasmuch as some of the trust property might not be of a nature to be properly transferable by assignment—(*Price v. Dewhurst*, 8 Law J. Rep. (N.S.) Chanc. 267). He proposed to take the order appointing a person to execute a proper deed of assignment of such of the property as was properly the subject of assignment. The VICE CHANCELLOR made the order.

(2) See *Walton v. Nerry*, 6 Sim. 328.

sole purpose of appointing a person to convey in his room, under the 8th section, is apparent from *Beale v. Ridge* (3).

Mr. G. Richards and *Mr. Selwyn*, for the wife and other defendants.

The VICE CHANCELLOR.—I doubt whether you can bring the husband within the 8th section of the act. In order to do this, you must shew that he is the trustee "last known to have been seised," but here there is a joint seisin in the husband and wife. You had better simply take a decree for sale, and let the husband be declared a trustee within the meaning of the act. It is possible that, before you come for a conveyance, some circumstances respecting him may come to your knowledge which will remove all further difficulty.

V.C. June 3. *HEMINGWAY v. BERNARDOS*.
Practice.—Amended Bill.—Time for answering.—Replication.—Costs.

After the expiration of seven weeks from the time of filing an amended bill, if the defendant does not put in his answer, or obtain an order for further time to answer, the plaintiff has the option of proceeding by process of contempt, or of filing his replication; and if the defendant, after replication, desires to put in an answer, he must pay the costs of the motion for that purpose.

After answer to the original bill, the plaintiff amended his bill, the order to amend being drawn up in the usual form, without inserting the words "requiring no further answer from the defendant" (1); and the common subpoena to answer was served upon the defendant. The amended bill was filed on the 1st of March, and the defendant appeared on the 11th of March. No answer being put in to the amended bill, the plaintiff, on the 1st of May, filed his replication, and served a subpoena to rejoin. A motion was now made, on behalf of the defendant, that he might be at liberty to file his answer to the amended bill, notwithstanding the replication.

(3) 4, You. & Cl. 248.

(1) See *Boddington v. Woodley*, 8 Law J. Rep. (N.S.) Chanc. 9.

Mr. K. Bruce, for the defendant.—The plaintiff cannot, if he takes the order to amend in this form, proceed further, without getting in the defendant's answer. There is no intimation that time would not be given to the defendant to answer; and at the time the replication was filed, he was in fact collecting information for that purpose. It was an irregularity, therefore, to file the replication, and the plaintiff must pay the costs of this motion to set it right.

Mr. Bethell and *Mr. Shadwell*, for the plaintiff.—It is immaterial for this purpose whether a further answer was required by the plaintiff or not. The defendant had the time allowed for answering; and the plaintiff, after waiting more than the seven weeks, chose to go on with the cause. There is no principle or rule of practice to prevent him from thus proceeding; he had the option of taking out process of contempt, or of filing a replication. He considered a further answer as of no value, and adopted the latter course—

Carr v. Paulett, 7 Sim. 142; s. c. 4 Law J. Rep. (n.s.) Chanc. 1.

James v. Crearwick, 7 Sim. 144.

Walsley v. Froude, 1 Russ. & M. 334.

Mr. K. Bruce, in reply.—If the defendant had been informed that no answer was required, he would have known that his answer must be put in within eight days, or the plaintiff would be at liberty to go on. The rule giving seven weeks to answer has no application; if the replication was right, it might have been filed the next moment after the amendment of the bill. The defendant is under no rule that he shall not put in any answer unless within seven weeks.

The VICE CHANCELLOR.—I do not think the cases which have been referred to are applicable to this question. In *Carr v. Paulett*, the bill was ordered to be taken *pro confesso* in December 1833, and it was not until the month of November 1834, that the defendant applied for liberty to put in his answer. The other case was a case upon the statute, which allows only twenty-eight days. The present case appears to me to be new. There is no doubt that the Court must give the defendant the opportunity of putting in his answer; the question therefore is only one of costs. If

the defendant did not put in his answer within the seven weeks, and did not at the expiration of seven weeks take out any order for further time to answer, I think the plaintiff was then at liberty to file his replication. If the seven weeks is not to be the time for answering, what time is to be given? It is obvious there must be some definite time. I think the plaintiff was regular. The defendant must have liberty to file his answer, but he must pay the costs of the motion.

Order: the defendant to be at liberty to file his answer within one week; plaintiff to be at liberty to have the replication taken as a replication to both answers, and to set down the cause this term. Defendant to pay the costs of the motion.

V.C.

June 5.

SALVIDGE v. TUTTON.

Practice.—Service of Petition.

It is irregular to serve a petition, after the petition day for which it is answered.

The petition in this case was answered by the Lord Chancellor, on the 22nd of May, for the next day of petitions. The next day of petitions was the 24th of May. The petition was not served until the 27th of May. An order was obtained to advance the petition, and put it in the paper for the 5th of June.

Mr. K. Bruce, for the petition.

Mr. Stinton suggested that there was an objection to the hearing of the petition, on the ground of irregularity in the service; it being after the day for which the petition was answered.

Mr. K. Bruce, in reply, argued, that the petition not having been set down or heard on the day for which it was answered, might be regularly served afterwards, or otherwise the petition must be answered a second time, which it was never the practice to do.

The VICE CHANCELLOR said, that no order could be made on the petition, upon the service after the day for which it was answered.

V.C. }
June 8. } LINDSELL v. THACKER.

Devise — Trust — "Sole Use" — Legal Estate.

A devise by a testator of all his property, whatsoever and wheresoever, to his wife, "for her sole use for ever," does not pass a mere legal or trust estate, in hereditaments, in which the testator had no beneficial interest.

Certain copyhold hereditaments, part of the manor of St. Ives, were, in 1782, surrendered to the use of John Thacker, and Catherine his wife, for their lives, and the life of the survivor, with remainder to the use of the heirs and assigns of such survivor; and Thacker and wife were thereupon admitted accordingly. In the year 1786, Thacker contracted with J. Lindsell, deceased, for the absolute sale of the said copyhold hereditaments, and the purchase-money having been duly paid, Thacker and his wife (she having been examined according to the custom of the said manor) surrendered the premises to the use of Lindsell, the purchaser, and Margaret his wife, for their lives and the life of the survivor, with remainder to the use of the heirs of the said Margaret. The purchaser and his wife were duly admitted in 1786; and John Thacker, the vendor, about the same time, executed a bond to Lindsell, the purchaser, in the sum of 2,000*l.*, one condition of which bond was, that the said John Thacker and Catherine his wife, their heirs, executors, or administrators, and all and every person claiming under them any estate, right, title, or interest in possession or reversion in or to all or any of the said freehold and copyhold premises, or any part thereof, by, from, or under, or in trust for him, her, or them, should at all times thereafter, on the request of the said John Lindsell and Margaret his wife, their heirs and assigns, do all such further acts and assurances as should be necessary for effectually surrendering, releasing, conveying, and assuring the said copyhold premises unto the said purchasers thereof, their heirs and assigns. Lindsell entered into possession of the premises, and continued in possession until his death in 1834, when the plaintiff, his widow, who survived him, entered into possession of the same

premises. After the sale to Lindsell, Catherine, the wife of John Thacker, died, leaving him surviving; and John Thacker became bankrupt, and obtained his certificate. He then married a second wife, Ann, and on the 1st of January 1823, after the bankruptcy, made his will in these words:—"I hereby give and bequeath all my property, whatsoever and wheresoever the same may be, at the time of my decease, unto my loving wife, Ann Thacker, for her sole use, for ever; and I also further appoint my affectionate and loving wife, Ann Thacker, whole and sole executrix to this my last will; and I further declare and appoint Henry Markland and Edmund Pelt Sharpe, executors in trust, to this my last will. John Thacker died in 1823, leaving his wife, the defendant, Ann Thacker, surviving. The bill stated the above facts, and prayed that the defendant, Ann Thacker, might be decreed to come in and be admitted tenant to the said copyhold hereditaments; and thereupon to surrender the same to the lord, so that seisin thereof might be given to the plaintiff, or such person or persons as she might appoint in fee, according to the custom of the manor. The defendant demurred; and the question was, whether, to make a good title to the copyhold premises, it was necessary that the defendant, Ann Thacker, as devisee under her husband's will, should execute a release of the premises, or any legal estate therein, to the plaintiff, the surviving purchaser.

Mr. K. Bruce and Mr. Wallcock, in support of the bill.

Mr. James Russell and Mr. Romilly, for the demurrer.

The cases cited were—

Adamson v. Arncliffe, 19 Ves. 416.

Ex parte Ray, 1 Madd. 109.

Ex parte Brettell, 6 Ves. 577.

Lord Braybrooke v. Inskip, 8 Ves. 417.

Roe d. Reade v. Reade, 8 Term Rep. 118.

White v. Fitty, 2 Russ. 484.

Ex parte Marshall, 9 Sim. 555; s. c. 8

Law J. Rep. (n. s.) Chanc. 187.

Ex parte Shaw, 8 Sim. 159; s. c. 5

Law J. Rep. (n. s.) Chanc. 378.

Ex parte Whittaker in re Danne, 1

Saund. Uses, 359, n.

The VICE CHANCELLOR.—I am of opinion, that the demurrer ought to be allowed, and for this reason—the rule laid down in the case of *Lord Braybrooke v. Inskip*, I take to be that which must guide me. That general words in a devise will have the effect of carrying the real trust estate, as well as the real estate in which the testator is beneficially interested, unless you find something to shew that the intention of the testator was, either that the estate devised shall be beneficially enjoyed by the devisee, or shall not be beneficially enjoyed by the devisee. Thus, in a case where the devise is of all the real estate to a devisee, in trust, to sell, and take the proceeds, there clearly a mere dry legal estate cannot be meant to pass. So, where there is a gift to one for life, with remainder over, that is a mode of disposition inconsistent with the taking of a mere dry legal estate. In this case, if the testator had simply given the estate to his wife and her heirs for ever, it would have passed the legal estate; so, if given to her in any general words, amounting to the same thing only, I apprehend, the legal estate would have passed, according to what Lord Eldon says in *Lord Braybrooke v. Inskip*, where he speaks of *Ex parte Brettell*, and says:—“I certainly did not mean to be understood to put anything, as I am now understood at the bar, to have done, upon the expression that it was given to the use and behoof of the party. I agree, that giving to a man, his heirs and assigns, is perfectly the same. But I meant, that I thought I could collect, that the testator intended to give that individual a property, which he could enjoy as beneficially as that property that was his own. I desire, therefore, not to be understood to put that opinion upon any such words, except so far as I could collect the intention from the will; calling in aid the particular situation of the devisee. My meaning was only, that it may be a circumstance, upon the intention, that the testator did not mean a mere dry trust estate, and not in a beneficial sense altogether his, should pass as his, under general words; when, if it did, it was incapable of such a large species of enjoyment as, upon the whole will, he intended to give in every part of the property.” Then here, the testator

has not merely given it to his wife, with words of amplitude; but he has given it to her in a particular manner, “unto my wife for her sole use for ever.” The use of the word *sole* necessarily implies “separate” use; and it is an indication that the testator meant the estate which he devised to her, should be beneficially enjoyed by her. If I find the intention was, that the subject of the devise should be beneficially enjoyed, I am bound, by the decision in *Lord Braybrooke v. Inskip*, to hold, that this is a sufficient demonstration of the testator’s intention, that the mere dry legal estate shall not pass. As to the point, whether the heir is a necessary party, it is sufficient to say, that the bill is filed to have an execution of a conveyance by the widow, and not for general relief.

Demurrer allowed.

V.C. }
June 9. } DAY OF DAVENON.

Devise — Fee Simple or Life Estate —

“Property,” Construction of

Devise of freehold premises by testator to his wife, for her sole use and benefit, and appointment of his said wife, if she remained unmarried, sole executrix and residuary legatee to all other property—he might possess at his decease:—Held, to pass the fee simple to the wife in the said freehold premises.

Philip Caley, by his will, made in 1821, gave, devised, and bequeathed unto his wife, Sarah Caley, all that freehold dwelling situate in the East India Dock Road, in the county of Middlesex, in the occupation of S. Kingsell, with all the garden ground and other appurtenances thereunto belonging; and also all that cottage and stable situate at the back part of the last-mentioned dwelling-house, being also freehold, for her sole use and benefit after his decease. And he also gave and devised unto his said wife, Sarah Caley, for the term of her natural life, all the rents and benefits arising from a dwelling-house in the said East India Dock Road, let on lease to J. Walker. And he also gave and devised unto his said wife, Sarah Caley,

all his household goods, plate, linen, china, and wearing apparel, nevertheless, if his said wife, Sarah Caley, should marry after his decease, then his will and testament should be void, and of no effect, but the whole of the above property should become the property of his daughter Ann Caley, during her natural life, and after that to be divided between her children, if there should be any living; but in case his wife Sarah remained unmarried, he then gave and bequeathed unto his daughter, Ann Caley, the rents and profits of the house now let on lease to J. Walker, after the decease of his wife, for her, Ann Caley's natural life, and to her children if she should have any living; and if not any living, then in that case he gave and bequeathed the aforesaid dwelling-house unto the children of W. Day, and the children of J. Crepin, to be equally divided amongst them. He also appointed his wife, Sarah Caley, provided she remained unmarried, sole executrix and residuary legatee, to all other property he might possess at his decease; and he desired her to pay to Catherine Corkhill, the yearly sum of 10l.; and concerning his funded property, he thereby empowered his said wife to sell out sufficient to pay all his debts, funeral expenses, &c., and after that he gave and bequeathed unto his said wife the one half of what should remain, for her own use and benefit, the other half he gave unto his daughter Ann Caley, to be laid out in a government annuity.

The testator's said wife survived him, and did not marry again. She died in 1868, having devised the freehold premises in the East India Dock Road, described in the will of the testator as in the occupation of S. Kingsell, with the garden ground and appurtenances, to the plaintiffs as tenants in common in fee. The plaintiffs contracted to sell part of the garden ground to the defendant. An objection was taken to the title, on the ground that the will of Philip Caley passed only a life interest in the premises to the testatrix. To a bill for specific performance of the contract, the defendant demurred.

Mr. Wigram and Mr. K. Parker, in support of the demurrer, cited—

Pogson v. Thomas, 6 Bing. N.C. 397.

Kellett v. Kellett, 3 Dow, P.C. 248.

Mr. K. Bruce and Mr. Pitman, for the bill, were not called upon,

The Vice-Chancellor.—The case is reasonably plain, I can only wonder, that there should have been thought to be anything in the case of *Kellett v. Kellett* which could create a doubt. The heir-at-law himself only claimed the benefit of the resulting trust; and the difficulty raised was, upon the words in which the testator expressed himself, in what was insisted upon as a residuary clause: he said, "I also ordain, appoint, and devise (certain persons) executors to this my last will and testament, also my residuary legatee, share and share alike,"—not saying of what. It does not appear what was done upon the certificate, in *Pogson v. Thomas*. On the first point, the Court of Common Pleas no doubt held rightly, that the lands in other parishes did not pass under the gift of lands situate at Kesgrave; and, on the other point, they might have considered the gift of the residue to the devisees, their executors, administrators, and assigns, as pointing exclusively to personal estate. In the present case, the testator having given the property expressly to his wife for her sole use and benefit, after his decease, he gives her other property for her life, and disposes of the second property by a gift over to his daughter and her children, in case his wife died unmarried, but he makes no disposition over, in that event, of the first part of his property. He then says,—"I also appoint my wife, Sarah Caley, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." The expression "to" all other property, has the same effect as if he had said, "of" all other property. The word "property," thus placed, must be held to carry the fee simple of everything, in which that interest is not before given by the will. It is plain, that this residuary clause applies to real estate, for the testator afterwards goes on to speak of his funded property as of a distinct thing. As to the objection which has been taken, that the word "property" must be restricted to mean the thing given, and not the interest of the testator in it, it must be observed, that the testator clearly uses the

word "property" in both senses, in the former part of his will, where he says, in the event of the marriage of his widow, "the whole of the above property shall become the property of my daughter." The same construction must be given to the word, where it occurs in the residuary clause. I think, the will of Philip Caley, passed a fee simple to the testatrix, in the premises in question.

Demurrer overruled.

JANUARY 10, 15. } STRICKLAND v. STRICKLAND,

Bill of Revivor — Plea — Demurrer — Duplicity — Pleading — Parties — Contradictory Statements

The original bill, for the administration of the estate of A, stated, that B. and C. were his executors, and had proved his will. The bill of revivor stated, that the statement in the original bill, that B. had proved the will of A, was inaccurate; that C. alone had proved the will; that C. was since dead, having appointed B. his executor, and that B. had proved C's will, and thereby become his personal representative, and also the legal personal representative of A, and had since possessed effects of both A, and B. B. by plea to the bill of revivor, averred, that in the lifetime, and since the death of C, he (B) renounced probate of the will of A, and that he (B) had never intermeddled with the estate or effects of A, and that no personal representative of A. was a party: — Held, that the statement in the bill of revivor could not be taken as displacing the statement in the original bill; that the statement of the original bill could only be displaced by amendment; and that the objection was therefore properly taken by plea, and not by demurrer.

That the plea averred only such matter as was necessary to negative the statement, that B. was the executor of A, and it was, therefore, not double.

This was a bill of revivor, which stated, that, in May 1838, the plaintiffs exhibited their original bill, which was afterwards amended, and, as amended, was against Sir George Strickland, Eustachius Strick-

land, and Charles William Strickland, and which bill, as amended, stated, that Sir William Strickland made and published his will, dated the 16th of October 1833, whereby he bequeathed to the plaintiffs certain legacies, and appointed the defendants, Sir G. Strickland and Eustachius Strickland executors of his will; that the testator died in January 1834, and that his will was duly proved by the said executors, Sir George Strickland and Eustachius Strickland, soon after his decease, and that they possessed themselves of his personal estate and effects; and it prayed an account of the personal estate of the testator, Sir W. Strickland, and payment of the plaintiffs' legacies; and, if necessary, that a decree might be made for the marshalling of the assets of the testator for that purpose. The bill of revivor then stated, that the statement in the said bill, that the defendant, Sir George Strickland, proved the said testator's will, was incorrect; the said Eustachius Strickland having alone proved the same; that the defendants appeared and put in their answers to the said bill; and in May 1840, before any further proceedings were had in the suit, the defendant, Eustachius Strickland, died, having first made and published his will, dated in February 1837, whereby he appointed the defendant Sir G. Strickland his sole executor, who, soon after the death of the said Eustachius Strickland, duly proved his said will, and thereby became and now is the legal personal representative of the said Eustachius Strickland, and also of the said Sir W. Strickland; that the defendants have, since the decease of E. Strickland, possessed his personal estate and effects to a considerable amount, and more than sufficient for the payment of all his funeral and testamentary expenses and just debts; and particularly the amount which was coming from his estate, as the executor of Sir William Strickland, and has also possessed certain of the effects of Sir William Strickland, to a very considerable amount; that the plaintiffs are advised that the suit and proceedings have become abated by the death of E. Strickland, as the legal personal representative of Sir W. Strickland, and that the same ought to stand revived against the defendant Sir G. Strickland, as the legal personal represen-

tative of E. Strickland and Sir W. Strickland; and the bill prayed the order of revivor, and an account of the personal estate of Sir W. Strickland and E. Strickland, come to the hands of the defendant, Sir G. Strickland.

To this bill the defendant Sir G. Strickland pleaded, that he was not the personal representative of Sir W. Strickland, deceased; and that he never intermeddled with the personal estate of the testator, Sir W. Strickland, and that he did, in the lifetime of E. Strickland, renounce the probate and execution of the will of Sir W. Strickland; and that since the death of E. Strickland, he having become the sole survivor of the executors named in the will of Sir William Strickland, deceased, did, by writing under his hand and seal, renounce his right, title, and interest in and to the probate and execution of the will, and in and to letters of administration of the goods, chattels, and credits of Sir W. Strickland, and that the personal representative of Sir W. Strickland is not made a party to the bill, nor process thereby prayed against him, although, upon the plaintiff's own shewing, such personal representative is a necessary party to the bill.

Mr. K. Bruce and Mr. Shadwell, in support of the plea, cited—

Arnold v. Blencome, 1 Cox, 426.

Scott v. Briant, 6 Nev. & Man. 381.

Pawlet v. Freak, Hardr. 111.

Mr. Bethell, for the bill.

June 15.—The VICE CHANCELLOR.—In this case a bill of revivor was filed, which stated, that, in May 1838, the plaintiffs exhibited their original bill against Sir G. Strickland, E. Strickland, and C. W. Strickland, and stated, that Sir Wm. Strickland made his will, and appointed Sir G. Strickland and E. Strickland his executors; that the will was proved by both of the executors, and that they possessed themselves of the testator's personal estate and effects. The bill of revivor then states, that the defendants appeared, and put in their answer; that the statement that both the executors proved the will was incorrect, and that E. Strickland alone proved the same; that the defendant, E. Strickland,

died, having made his will, and appointed Sir G. Strickland his executor; that Sir George Strickland proved the will, and thereby became and now is the legal personal representative of the said Eustachius Strickland, and also of the said Sir William Strickland. The bill then states, that Sir G. Strickland, since the decease of E. Strickland, possessed his personal estate and effects, and also possessed certain effects of Sir W. Strickland, without saying when he possessed the latter. The bill then prays an account of the assets of Sir W. Strickland and Eustachius Strickland, come to the hands of the defendant, and that the suit and proceedings may stand revived against Sir George Strickland, as the legal personal representative of the said testator, E. Strickland and Sir William Strickland. To this bill the defendant has put in this plea:—That the defendant is not the personal representative of Sir W. Strickland, and that he never intermeddled with the personal estate of the testator Sir W. Strickland; and that he renounced probate of his will in the lifetime of Eustachius Strickland, and has, since the death of E. Strickland, renounced probate and execution of the will of Sir William Strickland. And the plea then says, that the personal representative of Sir W. Strickland is not made a party to the bill, and process is not prayed against him.

It is objected, first, that this is a double plea; and secondly, that it is a defect apparent on the face of the bill, and should, therefore, have been brought on by way of demurrer, and not by plea. The law upon this point is laid down in *Hensloe's case* (1), in these words: "And the Court took this difference, when many are named executors, and some of them refuse and some of them prove the will, those who refuse may afterwards, at their pleasure, administer, notwithstanding this refusal before the ordinary; but if all refuse before the ordinary, and the ordinary commits administration to another, there they cannot afterwards administer. And this difference is proved by our book, in 21 Ed. 4, 24 a, where it is resolved by the Justices, that if twenty are named executors, and one proves the will, it sufficeth for them

(1) 9 Rep. 37.

all; and the refusal before the ordinary, is not any estoppel against them to administer after, when they please in our law, and we have no regard in this point to the law of the church. And the executor who proves ought to name them who refuse, in every action to recover the debt, and they may release the whole debt. And it is clear, that they who refuse shall have an action by survivor. But it is held, in 86 Hen. 6. 8 a, that if a man makes two executors, and both refuse before the ordinary, now they can never after administer as executors by force of the will, for now the testator dies intestate; otherwise, when one proves and the other refuses before the ordinary, the other may administer with him when he will. The same principle is also stated in *Stratford v. Blencome*, and it has never varied. Now it is stated in the bill of revivor, that the statement in the original bill, that both the defendants proved the will, was inaccurate; but I apprehend that the proper mode of pleading, where anything is stated in the original bill inaccurately, is not by making an averment in the bill of revivor, contrary to what is so stated in the original bill; but the proper course, I apprehend, is to correct the inaccurate statement by amending the original bill. As the two bills at present stand, there is no reason for giving credit to one more than to the other. Which statement is the Court to assume to be the right one? Though it is not strictly averred, it may be taken, on the bill of revivor, that Sir George survived Eustachius. The bill then states it as a fact, that Sir George Strickland did possess certain effects of Sir William Strickland, and it throws, by this averment, the character of executor upon Sir George Strickland, and renders it necessary, on his part, to shew that the fact is not so. It makes it imperative upon him to meet the allegation, that he became the personal representative of Sir William Strickland, not only by averment in his plea, to shew his renunciation in the lifetime and after the death of Eustachius, but also to shew the fact, that he did not intermeddle with the estate. By those double averments only can he get rid of the conclusion of law, which must be drawn from the statements in the original bill and bill of revivor, that

he proved the will, and possessed certain effects of the testator; and which facts would necessarily have the effect of giving him the character of executor. These averments only shew, step by step, the facts necessary to negative the conclusion, that the defendant is the personal representative. I think the plea is not liable to either of the objections which have been insisted upon in argument, and that it is a good plea, and must be allowed.

Plea allowed, with liberty to amend.
May 22, 31. PEARCE & GRAY.

Practice.—Discharge of Irregular Order.
An order, issued upon a Master's report, which had not been filed, was handed in by the party who obtained it or its holder, that the other party, who had not thereby prevented from moving to discharge it, it was a flaw in irregular order had been abandoned by the plaintiff, who obtained it, but before the defendant had moved to have it discharged, the plaintiff obtained another order for the same purpose. It held, that the second order was irregular; and it was discharged with costs.

Exceptions had been taken to the answer, some of which had been allowed by the Master, and a further answer was filed. Exceptions were then taken to the further answer; and, on the 28th of April, the plaintiff obtained an order to refer the exceptions to the Master. It appeared, however, that the Master's certificate or report upon the first exceptions had not been filed (1), and upon this ground the defendant's solicitor did, on the 16th of May, serve a notice of a motion to discharge the order of the 28th of April, for irregularity. He then found that two papers had been served by the plaintiff's solicitor upon the defendant's clerk, in court: one of which stated, that the plaintiff abandoned the order of the 28th of April, and tendered 6s. 8d. for costs; and the other tendered a further sum of 1l. for

(1) See general order of the 29th of October 1692, and *Wynne v. Jackson*, 2 Sim. & Sta. 226, *Smith's Ch. Pr.* vol. 1, p. 604.

costs. The defendant's costs amounted to more than the sum tendered. The motion was heard before the Master of the Rolls on the 8th of May, when his Lordship discharged the order of the 28th of April.

On the 5th of May, the defendant, having abandoned the order of the 28th of April, had obtained another order to refer the second set of exceptions. The plaintiff now moved, that this order of the 5th of May might be discharged for irregularity, as it was obtained while the order of the 28th of April was standing as an order of the Court, and was for the same object as that order.

Mr. Pemberton and Mr. Dunn appeared for the plaintiff; and

Mr. Bethell for the defendant.

May 31.—The MASTER OF THE ROLLS said, that when a party had obtained an order, he was not at liberty to tell the other party that he abandoned it, and thus prevent him from moving to discharge it, or to treat the existing order as a nullity; the plaintiff had mistaken his course of proceeding, and the order which was asked for must be granted.

Motions granted, with costs.

L.C. }
June 2. } SAUNDERS V. VAUTIER.

Will—Legacy—Construction.

A testator bequeathed to his executors all his East India stock, upon trust, to accumulate the interest till D. attained twenty-five, and then to transfer the stock, with the accumulations, to D:—Held, that this legacy was vested, and that D. having attained twenty-one was entitled to call for a transfer of the fund.

Richard Wright, by his will, dated the 30th of August 1827, bequeathed as follows:—"I give and bequeath to my executors and trustees, hereinafter named, all the East India stock which shall be standing in my name at the time of my decease, upon trust, to accumulate the interest and dividends which shall accrue due thereon, until Daniel Wright Vautier, the eldest son of my nephew Daniel Vautier, shall attain his age of twenty-five

years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns, absolutely." And the testator then disposed of his residuary estate for the benefit of his said nephew, Daniel Vautier, and his wife, for their lives, with a gift of the principal to their children at twenty-one, or marriage if daughters.

The testator died in March 1832, having, at the time of his decease, a sum of 2,000*l.* East India stock, and this suit was instituted for the administration of his estate.

In July 1835, when Lord Cottenham was Master of the Rolls, he made an order, upon the petition of D. W. Vautier, appointing his mother to be his guardian, and part of the 2,000*l.* was ordered to be sold to pay for his past maintenance; and the order directed that 100*l.* per annum, should be paid to Mrs. Vautier, his mother, for his future maintenance.

D. W. Vautier attained twenty-one in March 1841, and presented a petition to the Master of the Rolls, praying for a transfer of the East India stock to him, or otherwise for a reference to the Master to inquire, whether it was proper that any part of it should be sold, and the proceeds applied in establishing him in business.

Upon the petition being brought on before the Master of the Rolls, on the 7th of May 1841, his Lordship considered that a construction had been put upon the will by the present Lord Chancellor, when he made the order for maintenance in 1835, and directed that the petition should stand over, in order that a petition might be presented to the Lord Chancellor to rehear the petition of 1835.

A petition of re-hearing was presented accordingly to the Lord Chancellor by the other children of Daniel Vautier, which now came on to be heard.

Mr. G. Richards and Mr. Deane, for the petitioners, contended, that the gift to D. W. Vautier was only to be found in the direction that the trustees should pay him, and the payment was directed to be made when the legatee attained twenty-five; and until that time, the legacy was contingent, and therefore the stock ought not to be transferred to him.

Mr. Wigram and Mr. Wood, contra.

Mr. O. Anderdon appeared for the trustees.

The following authorities were cited:—

Branstrom v. Wilkinson, 7 Ves. 421.

Leake v. Robinson, 2 Mer. 363.

Batsford v. Kebbell, 3 Ves. 363.

Newman v. Newman, 10 Sim. 51; s. c.

8 Law J. Rep. (n.s.) Chanc. 354.

1 *Roper on Legacies*, 498, 3rd edit.

Love v. L'Estrange, 5 Bro. P.C. 59.

Hanson v. Graham, 6 Ves. 239.

Lane v. Goudge, 9 Ves. 225.

Boddy v. Dawes, 1 Keen, 362; s. c. 6

Law J. Rep. (n.s.) Chanc. 145.

Knight v. Knight, 2 Sim. & Stu. 490.

The LORD CHANCELLOR said, he thought the order of 1835 was correct; that the legatee took a vested interest in the East India stock upon the death of the testator, and that as he had now attained twenty-one, he was entitled to have a transfer of the stock.

Petition of appeal dismissed, with costs.

L.C. }
June 5. } *In re WALKER.*

Mortgage—Statute 1 Will. 4. c. 60—*Lunatic not found such by Inquisition*—*Mortgagee.*

A mortgagor presented a petition under the 1 Will. 4. c. 60, to obtain a reconveyance of the mortgaged estate, alleging, that the mortgagee was of unsound mind; but, the correctness of that allegation being disputed, the Lord Chancellor held, that he had no jurisdiction in the case.

A petition had been presented to the Lord Chancellor, stating an indenture of mortgage, by which certain estates were vested in Michael Walker and another person, for a term of 1,000 years; that the petitioner (the mortgagor) was desirous to redeem the mortgage, but that Walker was not then of sound mind, and was incapable of managing his affairs; and praying the usual reference to inquire whether Walker was of unsound mind, and if so, whether

he was a mortgagee within the meaning of the act; and to approve of a proper person to assign the term for Walker.

The usual order was made upon this petition; and from the evidence which was produced before the Master, it appeared that Walker had had attacks of paralysis, which had materially injured his health, and rendered him unable to walk, or talk, or sign his name: that his mental faculties were also impaired, but not to such a degree that he was incapable of understanding a deed if it was read over and explained to him. The evidence was very conflicting, and the friends of Walker refused to allow the mortgagor, or his solicitor, or medical adviser, to see Walker.

The Master, by his report, stated, that he found Walker was not of unsound mind; and a petition was presented on behalf of Walker, praying that this report might be confirmed.

The mortgagor presented a cross petition against the report, praying a declaration, that Walker was of unsound mind, or for such directions as the Court should think fit, for ascertaining whether he was lunatic or of unsound mind, and that it might be referred back to the Master.

Mr. Wigram and Mr. Wray, for the mortgagor, contended, that the evidence, as to the imbecility of Walker, was sufficiently strong to induce the Court to make the order which the mortgagor asked for: and relied on *Ridgeway v. Darwin* (1).

Mr. Richards and Mr. Simons appeared for Mr. Walker; but were not called upon.

The LORD CHANCELLOR said, that the act of 1 Will. 4. c. 60. did not give him such a jurisdiction as he was now asked to exercise, in cases where a party himself, or his family and friends, denied the fact of his being lunatic, but only in cases where there was no dispute; and he must, therefore, confirm the Master's report, and dismiss the petition of the mortgagor; and the costs of Walker, incurred by these proceedings, must be paid by the mortgagor.

(1) 8 Ves. 65.

V.C. }
June 15. } JACKSON v. CASSIDY.

Injunction—Practice—Affidavit.

The order for a special injunction was discharged with costs, on it appearing that office copies of the affidavits on which it was founded, were not obtained early enough to be in court at the time the motion for the injunction was made.

It was moved on behalf of the defendant, to discharge an order made in March last, directing that a special injunction should issue against him. The alleged ground of the application was, that the affidavits in support of the case made by the bill, were not filed at the time the motion for the injunction was made. It appeared from the statement of the clerk in the affidavit office, and from the affidavits made on the present application, by the solicitor of the parties, that the affidavits in question were filed soon after ten o'clock in the morning, and the motion and order were made about the same time. It was certain, that the office copies were not obtained, and in court, at the time the order was made.

Mr. Wigram and Mr. Hetherington, for the defendant.

Mr. K. Bruce and Mr. Goodeve, for the plaintiff (1).—There is no order rendering it necessary that the office copies should be in court. All that is required is, that they should be on the file of the court. Suppose the case were pressing, and the Court was informed that there was no time to make office copies, but the clerk of the affidavit office attended with the original, may not that be acted upon? The office copy may be inaccurate, and the Court then looks at the original. The party is not bound to take any office copy, unless he needs it for some purpose of his own.

The VICE CHANCELLOR.—The common practice in cases of emergency is, to have copies of the affidavits made and taken to the office, to be examined and stamped. There is no doubt, that in strictness the office copy must be in court. The Court

(1) They referred to Lord Bacon's Order, 1629, Beames's ed., pp. 56, 57.

has no other evidence at which it can look. It is admitted, there was no office copy in court when this order was made; and the objection being taken, I am bound to attend to it; and I must discharge the order, with costs.

V.C. }
June 25. } BURDETT v. BOOTH.

Creditor's Suit—Admission of Debt.

The admission of the debt by the answer of one of two executors, is a sufficient foundation for a decree in a creditor's suit.

The plaintiff filed his bill, as a creditor of the testator, for the administration of the estate. There were two executors; one of the executors, by his answer, admitted the plaintiff's debt; the other stated that he was wholly ignorant of it, and submitted that it ought to be proved, by evidence at the hearing.

Mr. K. Bruce and Mr. K. Parker, for the bill.

Mr. Greene, contra.

The VICE CHANCELLOR held the admission of one executor to be sufficient, and made the usual decree.

L.C. }
July 8; Aug. 7. } BOWER v. MARRIS.

Interest—Bond Debt—Bankruptcy—Surplus Estate—Application of Dividends—Calculation—Appropriation—Assignees.

The estate of A, a bankrupt, yielded a surplus after paying 20s. in the pound on the debts proved; A was one of the obligors in a joint and several bond to C, who proved against A's estate for the principal sum on the bond, and a small arrear of interest due at the date of the commission, and in the course of seventeen years A. paid different dividends, amounting to 20s. in the pound upon the debt so proved, and afterwards, under a decree for the administration of the estate of the co-obligor E, C. claimed payment of what he had not received from the estate of the bankrupt, and insisted that the amount was to be calculated, by applying

the dividends which he had from time to time received from the bankrupt's estate, in discharge of the interest then due, and the surplus (if any) in discharge pro rata of the principal:—Held, that such application of the dividends so received from time to time by C, was correct, and that the dividends were not appropriations in respect of the principal sum due.

Held, also, that such payments from time to time, did not affect the remedy of C, the obligee, against the estate of the co-obligor.

The official and general assignees of a bankrupt ought not to sever, and appear separately at the hearing.

This was a creditors' suit, and by the decree made in 1817, it was referred to the Master to take an account of the monies come to the hands of Joseph Marris, as trustee and executor of the estates of F. Bower and Mary Bower, deceased, or to the hands of any other person or persons, by his order, or for his use, and also an account of what was due to the plaintiff, and all other creditors of Joseph Marris, and to the defendants Watson, Moore and Skipworth, in respect of debts due from Joseph Marris alone, or jointly with T. Marris and R. Nicholson, and which were paid by T. Marris and R. Nicholson, or either of them; and it was ordered, that the Master should compute interest on such of the debts as carried interest, after such rate of interest as the same respectively carried, with the usual directions; and the Master was also to take an account of the personal estate, and of the rents and profits and produce of the real estates of Joseph Marris, come to the hands of T. Marris, his executor, or to the hands of any other person or persons, by his order, or for his use, previous to his said bankruptcy, or to the hands of the defendants Watson, Moore, and Skipworth, his assignees, since that time; and if the same should exceed the several sums of money which had been paid by T. Marris and R. Nicholson, for or on account of debts due from J. Marris at his death, then what on taking the accounts should appear to be due to the plaintiffs in respect of the trust monies received by J. Marris, and to the other unsatisfied creditors of J. Marris, was to be answered by the defen-

dants, the assignees of T. Marris, out of his estate come to their hands, or to the hands of T. Marris before his bankruptcy, and which at the time of his bankruptcy remained undisposed of; and in case the same should not be sufficient for that purpose, then that the plaintiffs and the other unsatisfied creditors of J. Marris, were to be at liberty to go in under the commission of bankruptcy against T. Marris, and prove against his separate estate for so much as the Master should find to be due to them respectively, which the estate of the said J. Marris possessed by the assignees should be insufficient to satisfy, in case the debts so claimed to be proved did not amount to a greater sum of money than what should be due from the estate of T. Marris, to the estate of J. Marris. Further directions, and costs were reserved.

The Master, by his separate report, dated the 21st of November 1840, found, that by a bond dated the 6th of April 1805, executed by T. Marris and J. Marris, those persons became jointly and severally bound to Jonathan Dent in the penal sum of 26,400*l.*, for securing payment to him of 13,200*l.* on the 6th of April 1815, with interest in the meantime; that J. Marris and T. Marris, together with R. Nicholson, entered into co-partnership as bankers in 1807, and so continued up to the death of Joseph Marris; that Joseph Marris, by his will, appointed T. Marris, his executor, who proved the same; that T. Marris and R. Nicholson carried on the business of bankers after J. Marris's death; that on the 12th of February 1812, a commission of bankruptcy was issued against T. Marris and R. Nicholson, under which they were declared bankrupts; that Watson, Moore, and Skipworth, were chosen the assignees under the commission; that the original suit was instituted in Hilary term, 1812, by the plaintiffs, on behalf of themselves, and all other the creditors of J. Marris, against T. Marris, as his executor, and against Watson, Moore, and Skipworth, as the assignees of T. Marris; that on the 22nd of April 1813, Jonathan Dent carried in his claim against the separate estate of T. Marris, under the commission, in respect of his bond, and the same was then admitted to the extent of 13,655*l.* 18*s.*, being the said principal sum of 13,200*l.*,

and 45*l.* 18*s.* for interest due thereon up to the date of the commission, and then in arrear; that under the bankruptcy, Jonathan Dent had been paid several dividends upon his said debt, from the separate estate of T. Marris, amounting together to 20*s.* in the pound, on his proof, the last of which dividends was declared on the 10th of January 1834, and was paid to Jonathan Dent on the 1st of April 1834. The Master then set forth copies of the receipts given by Jonathan Dent to the assignees, for the dividends received by him, which on the face of them shewed, that the sums received by Jonathan Dent for dividends, were treated as if received in payment of the interest due upon the bond, as well that due at the time of the bankruptcy and included in the proof made thereunder, as the interest accruing due on the bond subsequently to the date of the commission; that the dividends had been applied, first, to the payment of such interest, and then in the reduction of the principal money on the bond; and that there was then due, in respect of the said principal money and interest thereon, the sum of 15,064*l.* 14*s.* 6*d.*, as appeared by the schedule to his report, which sum of 15,064*l.* 14*s.* 6*d.* was the full amount in which the estate of J. Marris was then indebted to J. Dent. Exceptions were taken to the Master's report by Toft and Chapman, two of the defendants interested in the estate of T. Marris, and the same came on to be argued before his Honour, the Vice Chancellor, on the 2nd of June 1841, who then declared, that each successive dividend under the bankruptcy of T. Marris, was to be attributed to the amount of the debt proved, that is to say, to the principal sum of money under the bond, and the interest due thereon at the date of the commission; and with that declaration his Honour ordered it to be referred back to the Master to review his report. From this order the executor of Jonathan Dent appealed.

Mr. J. Wigram, Mr. Bethell, and Mr. Heathfield, in support of the appeal.—The question is, whether the Master is not correct in applying the dividends, in the first place, in payment of the interest, and then in satisfaction of the principal sum due on the bond. Suppose the case of a bankrupt owing a sum of 10,000*l.*, in respect

of principal money, 500*l.* by way of interest thereon, and afterwards a very large sum of money, say 100,000*l.*, falls into the bankrupt's estate, in such a case the whole of the principal and interest monies due must be paid as between the *bankrupt and his creditors*; and the case is the same whichever way the matter is worked out, whether you proceed against the solvent obligor in the first instance or not. The 132nd section of the statute 6 Geo. 4. c. 16, which provides, in the case of there being a surplus estate, for the payment of interest on the debts of the bankrupt, is general in its terms, and the interest intended to be provided for by that section is such interest as the creditors would have been entitled to in case no bankruptcy had occurred. The other side say, the dividends are specifically appropriated to the payment of the debt, consisting jointly of principal and interest monies due at the date of the commission; and the appropriation being, as regards the bankrupt, valid, is good in favour of the co-obligor; the cessation of interest at the date of the commission, is a mere rule of convenience, and the contract, as regards the bankrupt himself, is a continuing contract, and as to him, the dividends must be applicable, in the first place, in payment of interest. In *Clayton's case* (1), the sums on both sides had been put down in a book which had passed between both parties. But independently of the statute 6 Geo. 4. c. 16, we have a right to go against the co-obligor of the bond, because the debt is not extinguished. In *re Higginbottom* (2) was the only case cited by the other side in the court below; and that case is in direct opposition to a large class of cases in our favour, commencing in the time of Lord Chancellor Hardwicke,

(1) 1 Mer. 572.

(2) 2 Gl. & Jam. 123; s. c. 5 Law J. Rep. Chanc. 84.—The following is an extract of the case from the Lib. Reg. by the title of *In re Buckmaster ex parte John Buckmaster*.—"August 12, 1826.—V.C. Sir J. Leach. Mr. Horne: As to the mode of calculating interest, is the difference between us, and states the mode, sect. 132, new act. Mr. Sugden, contra.—THE VICE CHANCELLOR.—You must calculate the interest thus: interest upon 100*l.* (sum assumed) till dividend, then deduct the dividend from the principal, and calculate upon balance until another dividend; then again deduct dividend, and so on; never computing the interest: that would be compound interest. No order was drawn up."

and proceeding downwards. There is no authority for saying that the receipt of dividends is a positive extinction of the debt; and the demand being a joint and several one, the law, as insisted on by the other side, if good as regards the bankrupt, cannot be so against the co-obligor.

Mr. Jacob and *Mr. Glasse*, for the respondents, *Toft* and *Chapman*.—The dividends have been fictitiously transferred by the Master from the debt really due, to payment of a debt which was not due, inasmuch as it consisted of interest that accrued subsequently to the date of the commission. It is a principle well established, that a dividend must be apportioned *pro rata* over the whole debt due, which, in the present case, consists of a principal sum and certain interest due thereon. *Clayton's case* is still good law; and the Court determined, that the payments in that case must rank according to order of time; the real principle is, that the payment of the dividends extinguishes *pro tanto* so much of each pound in respect of which the payment has been made.

Mr. G. Richards and *Mr. Bacon*, appeared for the official assignee, but were not heard, the Court being of opinion, that as the claim made was only against the surplus estate of the bankrupt, they could have no direct interest in the matter; the Court at the same time observed, that the two sets of assignees were not justified in severing their cases, and appearing separately, thereby increasing the burthen on the bankrupt's estate.

The following cases were cited in the course of the arguments:—

- Bromley v. Goodere*, 1 Atk. 75.
- Ex parte Morris*, 1 Ves. jun. 132.
- Ex parte Mills*, 2 Ves. jun. 295.
- Butcher v. Churchill*, 14 Ves. 573.
- Simson v. Ingham*, 2 B. & C. 65; s. c. 1 Law J. Rep. K.B. 234.
- Taylor v. Kymer*, 3 B. & Ad. 320; s. c. 1 Law J. Rep. (n.s.) K.B. 114.
- Ex parte Deey*, 2 B. & Beat. 77.
- Dixon v. Parkes*, 1 Esp. 110.
- Bardwell v. Lydall*, 7 Bing. 489; s. c. 9 Law J. Rep. C.P. 148.
- Raikes v. Todd*, 8 Ad. & El. 846; s. c. 8 Law J. Rep. (n.s.) Q.B. 35.
- Ex parte Holmes re Garner*, 9 Law J. Rep. (n.s.) Chanc. 33.

The LORD CHANCELLOR.—If there be any surplus of a bankrupt's estate after paying 20s. in the pound of the debts proved, which is unfortunately of rare occurrence, this would be a very important case. One of two joint and several obligors becomes bankrupt, and against his estate the obligee proves for the principal, and a small arrear of interest due at the date of the commission, and in the course of seventeen years, receives different dividends, amounting to 20s. in the pound upon the debt so proved; and afterwards, under a decree for the administration of the estate of the co-obligor, claims payment of what he has not received from the estate of the bankrupt, and insists that the amount is to be calculated by applying the dividends from time to time received in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the principal. This, no doubt, is the ordinary mode of calculation, and is the general custom and course of dealing in cases of mortgages, bonds, and other securities. As the principal does, and the interest does not carry interest, no creditor can apply any payment to the discharge of part of the principal while any interest remained due. If, therefore, there had been merely payments on account, there would have been no question between the parties. But it is said on behalf of the obligor's estate, that the payments by way of dividends under the bankruptcy of the co-obligor, were appropriated, and were paid to and received by the obligee, on account of so much principal money, and therefore interest, from time to time ceased on the amount of such principal money, although large sums were at those periods due for interest.

The question, so far as it is a question of principal, turns upon the accuracy of this view of the case. The proposition rests upon this, that the payments consisted of dividends of so many shillings in the pound, and that the sums on which such dividends were made being the debt proved, consisted (except a very small part) of the principal due on the bond, and therefore that, upon payment of every dividend, so many shillings in each pound of such principal money as the dividend consisted of, was by such payment dis-

charged. In the first place, as this mode of payment is regulated by act of parliament, the doctrine of appropriation, which is founded upon the intention expressed or implied of the debtor or creditor, cannot have any place in the consideration of the present question. The estate of the obligor under administration is liable to pay all that the obligee has not received from the co-obligor, that is to say, he is entitled to his principal and interest up to the time of the payment; and he is entitled to apply all payments on account of the interest due, before he could be bound to apply any part of it towards the discharge of the principal. If, therefore, he is bound, because these payments are made under the bankruptcy, to apply them towards the discharge of part of the principal, which bears interest, and thereby to leave interest due, which does not bear interest, he is a loser by the bankruptcy, although the whole of the principal and interest is ultimately paid; and what would be a more extraordinary result, the co-obligor will in the present case be a gainer by it in the same proportion, for although himself bound to pay principal and interest, he could not compel the obligee to accept payment of the principal while interest remained unpaid, yet he would derive the benefit of such payment out of his co-obligor's estate. This would be to give the mode of payment in bankruptcy the effect of depriving the obligee of part of his debt, and relieving the obligor from the liability to which he had by the bond subjected himself. This would be manifestly unreasonable and unjust, and is attempted to be supported only by the supposed appropriation of the dividends to the payment of so much of the principal; but in fact there is no such appropriation. The interest stops at the date of the commission; and though subsequent interest becomes due, it is not provable under the commission. The bankrupt's estate is taken from him by the commission, and the law, in order to make an equal distribution among the creditors, pays to each a dividend upon the debt due; but this is merely an arrangement for the convenience of the debtor's estate. The bankrupt continues indebted for the principal and interest accrued since the commission, although his certificate (if he obtains one)

protects him against the liability to the debt, and being so indebted, payments are made out of his estate to the obligee. Why should such payments have a different effect to what they would have if made by a solvent obligor? Why should they lessen the remedy which the obligee would have as against the co-obligor? Suppose the bankrupt does not obtain his certificate, but afterwards acquires property, and is sued by the obligee, ought not the obligee to be entitled to compel payment of all he could have demanded if there had been no bankruptcy? Suppose the assignees realize a surplus to the estate, ought the obligee, in the case supposed, to suffer, and the bankrupt's estate to be benefited by that? By the 132nd section of the statute 6 Geo. 4. c. 16, the bankrupt is not to receive the surplus until all the creditors have received interest upon their debts, to be calculated from the date of the commission. This provision obviously intended to make good to the creditors that interest which, by the course of administration in the bankruptcy, they had lost. Interest is stopped at the date of the commission, because it is supposed that the estate will be insufficient. It proves to be more than sufficient—why is the creditor to suffer, and the bankrupt's estate to be benefited by attributing the dividends to principal instead of interest? The creditor in that case will not have received interest upon his debt to the same extent as he would have done if there had not been any bankruptcy, and yet the act must have intended to place him in as favourable a situation.

If there had been no decision on this subject, I should have thought these reasons conclusive in favour of the mode of calculation adopted by the Master; but from the year 1745, to the case of *Ex parte Higginbottom*, in 1826, there has been a succession of cases in which this principle has been acted upon; and although it was not in all of them matter of adjudication, they prove that such was the recognized rule, so well understood, as not to be the subject of question. It appears to have been carefully established by Lord Hardwicke in *Bromley v. Goodere*, and the order in that case seems to have been framed by himself, and is so expressed as to leave

no doubt of its having been most carefully considered; and this was the opinion of that great Judge, of the justice of the case, without the aid of the statute. In *Ex parte Morris*, Lord Roslyn refers to this case, and says, "the whole must be computed as running interest." In *Ex parte Mills*, Lord Roslyn says, "Lord Hardwicke's line has been pursued by every Judge; it has now been for above fifty years past confirmed by every Judge." The attempt there was, to depart from the order, but not on this point; but if on this point that order had been thought questionable, we should neither have found such absence of comment on the part of the counsel, nor such strong approbation on the part of the Judge. In *Butcher v. Churchill*, Sir William Grant seems to refer to the mode of calculation adopted by Lord Hardwicke, and with approbation: he says, "Lord Hardwicke held clearly, that interest was referable to the original debt, so long as that was undischarged, and allowed it in that instance, until the whole was wound up." In *Ex parte Deey*, Lord Manners directed the commissioners to take an account of the interest, in the same manner as Lord Hardwicke had directed in the above case. And in *Ex parte Koe*, Lord Eldon directed the order to be in the same words as Lord Hardwicke's order. This particular point in that order had not been the subject of discussion, but Lord Eldon's direction proves that he had considered and approved of the whole of it.

Against all this authority, there is nothing but the case of *Ex parte Higginbottom*, in which no authority was cited, and which Sir John Leach decided upon the supposition, that the mode of calculation directed by Lord Hardwicke, would give compound interest, which was clearly a mistake. It is true, that in certain cases, dividends have been considered as an aliquot part of the debt, upon which interest is to be paid, but in all those cases, the ground of the decision has been, that to adopt any other rule, would work injustice, and defeat the contract between the parties. Such were the cases of *Paley v. Field* (3), *Bardwell v. Lydall*, *Raikes v. Todd*, and *Ex parte Holmes*. These are not autho-

rities for applying the rule to cases in which it would create a considerable degree of injustice, and defeat the contract, instead of doing justice between the parties. In those cases, the Court looks to the effect which the rule would produce on the interest of parties, and not to any abstract principle of appropriation.

It was said, that from the date of the order in *Ex parte Higginbottom*, a practice had prevailed, of calculating interest in the manner there directed: I have caused inquiries to be made on that subject, and I do not find that to be the case. Indeed, the instances of there being a surplus have been so few, that there have not been materials for establishing a practice. I have also had searches made to ascertain whether any order can be found, tending to shew what the practice had been; but I have not derived any assistance from such searches.

It has been suggested, that the law of appropriation has undergone some change in consequence of the case of *Devaynes v. Noble*, and that Lord Hardwicke's order would be inconsistent with the present state of the law founded on that case; but *Devaynes v. Noble* did not establish any new law. The points there expounded do not appear to have any application to the present case, and the general rules for the appropriation of payments are of much older date than that of Lord Hardwicke's decision, being all derived from the civil law.

I am of opinion, upon principle and authority, that the Master's report was correct; and therefore the Vice Chancellor's order must be reversed, and the petition excepting to the report be dismissed, with costs, and an order made on the other petition confirming the report.

M.R. } THE ATTORNEY GENERAL v.
June 22. } THE BISHOP OF LLANDAFF.

Charity—Petition—Craven Scholarships.

The Master of the Rolls made an order, without a reference to the Master, for increasing the allowance of each of the Craven scholars from 50l. to 75l. per annum, upon the production of a certificate by the trustees

3 A

that they approved of such an application of the surplus income of the charity estates.

This was a petition intitled in an original and two supplemental informations. It was presented by the trustees acting in the trusts created by the will of John Lord Craven, dated in 1647, whereby his lordship directed that out of the yearly rents of certain real estates thereby devised, 100*l.* per annum should be raised towards the maintenance of two poor scholars at each of the Universities of Oxford and Cambridge, and the residue of the rents was to be employed for the redemption of English Christian captives, prisoners in Algiers, or other places under the dominion of the Turks. By a decree made in 1819, the number of the scholars was increased from four to ten, and the annual allowance of each of them was increased from 25*l.* to 50*l.*

The annual income of the trust property consisted of 250*l.*, arising from real estate, and of 765*l.* arising from stock in the 3*l.* per cents., making, together, 1,015*l.* per annum.

The petition prayed, that, out of the surplus income of the trust estate and funds, an addition of 25*l.* per annum might be made to each of the ten now existing scholarships.

Mr. Pemberton and Mr. Craig appeared in support of the petition.

The MASTER OF THE ROLLS consented to make the order as prayed, without a reference to the Master, provided a certificate were produced, signed by the trustees, that they considered this to be a desirable and proper mode of dealing with the charity funds,—the certificate to be filed with the petition, or with the affidavits.

M.R. }
June 23. } RAMSBOTTOM v. FREEMAN.

Receiver—Practice—Motion—Service of Notice where Defendant has not appeared.

In a suit by an equitable mortgagee against the mortgagor, to which the defendant had not appeared, the Court refused to appoint a receiver, upon a motion, notice of which had been served upon the defendant personally: and also refused leave to serve the defendant

personally with such a notice, until the Court was satisfied that the plaintiff had taken all proper steps to compel an appearance.

A motion was made, in this suit, for an injunction and a receiver.

It was a suit by an equitable mortgagee against the mortgagor. The defendant had not appeared to the suit, and it was, consequently, impracticable to serve his clerk in court with the notice of this motion, and notice of it had been served, personally, on the defendant himself.

Mr. Lovat appeared in support of the motion, but the defendant did not appear upon it.

The MASTER OF THE ROLLS said, that the notice of motion could not be served on the defendant personally, without special leave of the Court; and, therefore, the motion for a receiver could not be granted.

Mr. Lovat then moved, *ex parte*, for an injunction; and also asked that the plaintiff might have leave to serve the defendant personally with notice of motion for a receiver, for the next motion day.

The MASTER OF THE ROLLS granted an injunction, but refused the other part of the application, on the ground that the Court should be first satisfied that the plaintiff had done all he could to compel the defendant to put in an appearance.

V.C. }
June 25. } LUMSDEN v. FRAZER.

Vendor and Purchaser—Conversion—Heir and Executor—Intermediate Rents.

The rents of real estate contracted to be sold, belong, after the death of the vendor intestate as to the legal estate, until the time for completion of the contract, to the heir-at-law of the vendor, and not to his executor.

The testator contracted to sell an estate of which he was seised in fee; but he died before the time for performance of the contract. The legal estate in the premises contracted to be sold descended on the heir-at-law of the testator; and the heir-at-law received the rents of the property until the time of the completion of the

contract. The question then arose, whether these intermediate rents belonged to the heir or the executor of the vendor.

Mr. K. Bruce and Mr. Baily, Mr. Stuart, Mr. Daniel, and Mr. Sidebottom, for the different parties.

THE VICE CHANCELLOR.—The law casts the legal estate upon the heir; and if he, on that legal right, receives the rents of the estate up to the time of the performance of the contract, when the purchase-money belongs to the executor, upon what principle should the Court take from the heir that which the law has given him? There is no rule in equity to deprive the heir of the rents which thus devolve upon him; on the contrary, where there is a measuring cast, the habit and principle of the Court is, to favour the heir rather than the executor.

M.R. }
July 1. } **ALDRIDGE v. WESTBROOK.**

Practice.—Costs—Trustees defending separately.

The co-heiresses of the surviving trustee under marriage articles, severed in their defence to a suit instituted for carrying the articles into effect. They lived at a distance from each other, and had never acted in the trusts:—Held, that they were entitled to two sets of costs.

This suit was instituted for the purpose of obtaining a specific performance of certain marriage articles entered into in the year 1802, by which the intended husband covenanted with the trustees to convey some real estate upon the trusts mentioned in the articles. All the covenantees named in the articles were dead, and the two co-heiresses of the survivor of them were made defendants to the suit. The bill prayed for the appointment of new trustees, and that a conveyance might be made, either to the co-heiresses or to the new trustees.

Both the co-heiresses were married, and one of them lived at Chelsea, and the other at Benson in Oxfordshire. They appeared and answered separately, and employed different solicitors in the suit. One of them put in a full answer, and submitted

to act under the direction of the Court upon being paid her costs. The other co-heiress put in a short answer, and also submitted to act under the direction of the Court. She stated that she was a stranger to the matters mentioned in the bill, and that, if she was a trustee, she wished to be discharged from the trusteeship.

The cause now came on for further directions: and a question was asked, whether these two defendants were entitled to more than one set of costs.

Mr. Bethell, Mr. Stinton, and Mr. Randall, appeared for the plaintiffs; and Mr. James and Mr. K. Parker, for the co-heiresses.—Gaunt v. Taylor (1).

THE MASTER OF THE ROLLS said—That as these two ladies had never acted together in any of the trusts of these articles, and had never undertaken to act in them, and were living at a considerable distance from each other, he thought they were not within the rule of the court, which gave only one set of costs to parties who severed in their defence; and his Lordship gave both these parties their costs, as between party and party.

V.C. }
July 16. } **ELLIOTT v. ELLIOTT.**

Legacy—Remoteness.

A gift of a residue unto all and every the children, sons and daughters of the testator's daughter, in equal shares and proportions, as and when they should respectively attain their respective ages of twenty-two years, will take effect as a gift to the children living at the death of the testator, but is void as to after-born issue.

The testator, by his will, after devising a certain freehold estate to his daughter Elizabeth, gave unto his said daughter the sum of 1,000*l.*; and he thereby gave and bequeathed all other his personal estate and effects unto and among all and every the children, sons and daughters of his said daughter Elizabeth Elliott, in equal shares and proportions, as and when they

(1) 3 Beav. 346; *s.o.* 7 Law J. Rep. (N.S.) Chanc. 2.

should respectively attain their respective ages of twenty-two years, and the interest on their said respective shares to accumulate and be paid as and when the said principal sums should be payable. The testator died in February 1826, leaving his said daughter, and four children of his said daughter, surviving. James William Elliott, one child of the testator's said daughter, was born after the death of the testator.

The question was, whether the gift of the residue was void for remoteness.

Mr. Palmer, for the next-of-kin, argued that the gift was clearly void. If twenty-two years might be named, any number of years would be good. The Court could not divide the class, and hold the gift good as to those who were alive at the testator's death.

Leake v. Robinson, 2 Mer. 363.

Vandry v. Geddes, 1 Russ. & Myl. 203; s. c. 8 Law J. Rep. Chanc. 63.

Mr. K. Bruce and *Mr. Hare*, for the children of the testator's daughter.

The Court is not obliged to hold the entire gift to be void, because some children might be born who could not take under it. As a gift to the children living at the testator's death, it must be good. Why is not the description of them in the will as effectual as if the testator had inserted their respective names? The Court may hold the after-born child to be excluded.

Davidson v. Dallas, 14 Ves. 576.

Mr. W. R. Ellis, for the executor.

The VICE CHANCELLOR.—I do not see any objection in principle to holding, that the words "all and every the children, sons and daughters of my daughter Elizabeth Elliott," mean the children of the testator's daughter then living. The description of the children is as definite as if they had been severally mentioned by their names. I think the most reasonable construction of the will is, to look upon it as expressing a gift to the children of the testator's daughter, living at the time of his death, when the will speaks.

Declaration that the children, exclusive of James William, were entitled to the residue.

V.G. }
July 31. } CORNEWALL v. CORNEWALL.

Specific Legacy—Devised Real Estate—Priority in Administration—Construction.

Specific legacies are to be wholly applied in payment of debts, where the rest of the personal estate is insufficient, after the application of real estate descended, but before the application of any part of the devised real estates.

The testator gave to his son all his furniture and articles of domestic use and ornament; and to his widow, the use of all his books:—Held, that the books passed to the son, under the first gift; and that the widow took a life interest in them under the second.

By indentures of lease and release of September 1815, certain real estates were limited to Sir G. Cornwall for life, with remainder to his first and other sons in tail male. By other indentures of lease and release, dated in July 1816, other estates were conveyed to trustees, upon trust to raise thereout, by sale or mortgage, monies sufficient to defray certain charges or incumbrances, set forth in a schedule thereto, and, subject thereto, to the use of Sir G. Cornwall in fee. Among the hereditaments comprised in the last-mentioned indentures, was the fee simple of certain tithes. Sir G. Cornwall, by his will, dated November 1818, devised all the estates comprised in the latter indentures, to the same uses to which the estates comprised in the former indentures should stand settled and assured to at the time of his decease; and he bequeathed unto his wife all his personal estate and effects whatsoever which should remain after payment of his debts, (exclusive of debts specially charged on his real estate,) and funeral expenses; and he appointed her sole executrix. By a codicil of March 1835, the testator gave to his eldest son all his plate and family jewels, and trinkets and ornaments of the person, and all his furniture and other articles of domestic use or ornament. By a second codicil, of the 20th of December 1835, the testator gave to his wife all the provisions and wines in his dwelling-house at Moccas Court, and all his pleasure carriages and horses, with their harness, and all his musical instru-

ments, and the use of all his books, and all the money in his dwelling-house, in his bankers' and land-steward's hands at the time of his decease, for her own sole use and benefit. By a third codicil, of the 24th of December 1835, the testator devised all his estate and interest in the said tithes to trustees, upon trust to sell, and to divide the produce equally between the testator's younger children, in equal shares and proportions, and to apply the rents and income, until a sale should be made, and afterwards the interest and dividends of the money produced by such sale, in their respective maintenance and education during their minorities, in such manner as his said trustees should think proper.

The testator died on the 27th of December 1835. The bill was filed in 1837, by the younger children of the testator, against his widow, heir-at-law, and devisees in trust, and the trustees of the said indentures of 1815 and 1816; and prayed an account of the personal estate of the testator, both specifically bequeathed and not specifically bequeathed, and that the same might be sold and applied in due course of administration; and that the hereditaments comprised in the indenture of July 1816 (exclusive of the tithes) might be sold, and the proceeds arising therefrom applied in paying off the incumbrances created thereon and on the said tithes by such indentures; and that, if necessary, the residue might be applied in satisfaction of the other debts of the testator which his personal estate should not be sufficient to pay; and that, if necessary, the portions provided for the plaintiffs by the indentures of 1815 might be raised out of the hereditaments and premises comprised in the indentures of 1816, subject to the prior charges thereon; and that the tithes might be sold, and the proceeds thereof secured for the benefit of the plaintiffs. The decree for the account was taken, and the Master found, that the personal estate and effects of the testator would be insufficient for the payment of his debts not provided for by the indentures of July 1816. The testator died seised of certain real estates, not comprised in either of the indentures of 1815 or 1816, and which descended to his heir-at-law. On the hearing of the cause for further directions, three questions were raised—

first, the general personal estate being insufficient for the payment of the surplus contract debts of the testator, whether the tithes devised by the third codicil should contribute rateably with the other devised real estates towards payment of the incumbrances specified in the deeds of 1816, or of the general debts proved in the cause. Secondly, whether the devised real estates ought to contribute rateably with the personal estate and effects specifically bequeathed to the eldest son and the widow, in payment of such of the specialty debts as the general personal estate and the real estates descended would be insufficient to pay; or whether the specific legacies were to be applied *in toto* before the devised estates. Thirdly, whether the books passed to the testator's son under the first codicil; and if so, whether, under the second codicil, the widow took an absolute, or only a life interest in them.

Mr. Richards and Mr. Freeling, for the plaintiffs, on the first point, cited—

Choat v. Yeats, 1 Jac. & Walk. 102.

Browne v. Groombridge, 4 Mad. 495.

On the second point, they argued, that the specific legacies should be resorted to prior to the devised estates. Before the Statute of Fraudulent Devises, a specialty creditor must have taken specific legacies in such a case, for he could not have taken real estate devised; but that statute, though it has given a more extensive remedy for the recovery of debts, has not altered, and was never intended to alter, the relative equities of legatees and devisees. It was made for the benefit of creditors, not for the benefit of legatees, and still less to confer a benefit on legatees to the prejudice of devisees.

Galton v. Hancock, 2 Atk. 434.

Haslewood v. Pope, 3 P. Wms. 322.

A specific devisee is, in fact, more favoured in equity than a specific legatee—*Clifton v. Burt* (1). The same principle is exhibited in the rule of the court, which does not give the widow, whose paraphernalia is taken by a creditor, any right to indemnification out of the real estate devised. That case is stronger, inasmuch as paraphernalia are preferred to specific legacies.

Ridout v. Lord Plymouth, 2 Atk. 104.

Probert v. Clifford, Ambl. 6.

Tipping v. Tipping, 1 P. Wms. 729.

(1) 1 P. Wms. 678.

Graham v. Lord Londonderry, 3 Atk. 395.

Snelson v. Corbet, *ibid.* 369.

The uniform principle in administration is, to exhaust the personal estate before resorting to the real estate.

Mr. Jacob and *Mr. De Gez*, for the heir-at-law, argued in support of the same principle of administration.

Mr. Nicholl, for the widow, who was the principal specific legatee, on the second point, argued, that the question, if any there were, had been expressly decided in the cases of *Long v. Short* (2) and *Silk v. Prime* (3), in both of which cases, real estate devised and specific legacies were held bound to contribute rateably to the payment of debts by specialty. The expression attributed to Lord Talbot, in *Haslewood v. Pope*, that "the specific legatees shall not stand in the place of the bond creditor to charge the land devised, because the devisee of the land is as much a specific devisee as the legatee of a specific legacy," is explained in *Roper* (3), and evidently means, not that the real estate should not contribute, but that the specific legatee is not entitled to have the assets marshalled, so as to throw the whole debt upon the devised estate. As against real estate descended, the specific legatee was clearly entitled to have the assets marshalled. The fourth resolution in *Haslewood v. Pope* determined that he had the same right as against land devised, where that land was charged with debts; and the fifth resolution did no more than determine, that the specific legatee had not the same right, where the land was devised, but not charged with debts. The very reason given for the rule thus laid down, substantially affirms the decision in *Long v. Short*; for the reason is, that one gift is *as much* specific as the other, and therefore one object of the testator's bounty should not exclude the other: that is the principle of rateable contribution. It is not true, that the right to paraphernalia is on a preferable or equal ground with the right to a specific legacy.

Burton v. Pierpoint, 2 P. Wms. 78.

Boyntun v. Boyntun, 1 Cox, 106.

(1) 1 P. Wms. 404; s. c. 2 Vern. 756.

(2) 1 Dick. 384; s. c. 1 Bro. C.C. 138, n.

(3) *Treatise on Legacies*, p. 839.

The very application of descended real estates before specifically bequeathed personality, which is admitted to prevail, is conclusive against the argument that the principle is always to apply personal estate before real. He cited also—

Oneal v. Mead, 1 P. Wms. 693.

Irwin v. Ironmonger, 2 Russ. & Myl. 531.

On the third point—

Cremorne v. Antrobus, 5 Russ. 312; s. c. 7 Law J. Rep. Chanc. 88.

Cole v. Fitzgerald, 1 Sim. & Stu. 189; s. c. 3 Russ. 301; 1 Law J. Rep. Chanc. 91.

Mr. Richards replied.

THE VICE CHANCELLOR.—I see no reason why these tithes should be exempted from their liability to contribute to the payment of debts with the other devised estates. With respect to the second point, I have referred to my own volume of *Peere Williams*, and I see, that many years ago I had my attention called to the conflicting decisions on this point, and I had added this note to the case in my book:—"Quære, however, if the statute against fraudulent devises was not made for the benefit of creditors, and not of legatees;" and then I have made a reference to *Galton v. Hancock*. I must say, the weight of authority always appeared to me to be in favour of the decision of Lord Talbot. I have always heard Lord Talbot spoken of as an excellent lawyer, and conversant with the law of the court in which he sat. Lord Eldon frequently expressed that opinion of him; added to which, Lord Talbot's decision, which is entirely supported by principle, is also the later decision. If I find two decisions, the first by one Lord Chancellor, and the second by another Lord Chancellor, and the second decision is according to principle, I think I have no ground for saying the later decision must not stand. I have, therefore, no difficulty in holding, that the specific legacies must be exhausted before the real estates are resorted to.

As to the point which has been made with respect to the books, the testator must be taken to have known that he had given by his will the general personal estate to his wife. By the first codicil, he gives to his eldest son all his plate and family

jewels, and trinkets and ornaments of the person, and all his furniture and other articles of domestic use and ornament. By the next codicil, he changes the form of the expression as to what he had given to his wife. He gives her "all the wines, &c., and the use of all his books." It is but a reasonable thing to suppose that he knew what he had done. I must take it, that he knew that he had given the books absolutely, by his will, to his wife. If books are used, they are articles of "domestic use"—if not used, they may be, and often are, articles of "ornament." The true construction of the two codicils is, the son takes the books absolutely, subject only to the use of them by the wife, which use can only be during her life. I shall, therefore, declare, that the books belong to the son, subject to the use of them for her life by the wife.

L.C. }
 July 17; } MACKRETH v. DUNN.
 Aug. 11. }

Vendor and Purchaser—Specific Performance—Title—Pleading—Multifariousness—Waiver.

A bill was filed for the specific performance of a contract, by one of two joint purchasers, against the other purchaser and the vendor. An objection taken by the defendant, the vendor, on the ground of multifariousness, and that the plaintiff could not support his bill, unless the joint purchaser joined him as a co-plaintiff therein, was overruled.

Semble—the acceptance of the title by the co-defendant, the joint purchaser, is no answer to the plaintiff's right to have a good title proved.

A subsidiary contract, by which the defendant, the vendor, became the occupant of part of the estate sold, at a fair annual rent, affords no impediment to a specific performance of the contract.

The bill in this case was filed by the plaintiff, as one of two joint contractors in writing for the purchase of an estate from the defendant Dunn, Richardson, the other contractor, being a co-defendant; and it sought a specific performance of the contract, according to the terms thereof; or

that, on payment by the plaintiff of the whole of the purchase-money to the vendor, the whole estate might be decreed to be conveyed to the plaintiff. Evidence at some length was entered into, to prove a correspondence that took place between the solicitors of the plaintiff and the defendant Dunn, respectively, with reference to the title and the abstract. The defendant Richardson offered, by his answer, to pay the purchase-money; and the defendant Dunn insisted that the plaintiff, by the delay that he had created, had waived a right to a specific performance: but the principal discussion arose upon the objections of the defendant Dunn, viz.—1st, that the bill was multifarious in making a case against the defendant Richardson, with which the defendant Dunn had nothing to do; and, 2nd, that the plaintiff could not sustain the bill without Richardson being joined with him as a co-plaintiff. And it was urged, that there could be no specific performance where the record remained (as in the case before the Court) in so doubtful a state, the joint contract no longer (as it was alleged) existing.

Mr. Richards and Mr. Pigott, in support of the bill, cited

Davis v. Symonds, 1 Cox, 402.

Hood v. Pimm, 4 Sim. 101; s. c.

2 Law J. Rep. Chanc. 232.

Mr. Bethell and Mr. Wright appeared for the defendant Dunn, and *Mr. Wakefield and Mr. J. Russell*, for the defendant Richardson.

Aug. 11.—The LORD CHANCELLOR.—It was hardly pressed at the bar, that the plaintiff was precluded by the length of time that had elapsed since the contract, or by an abandonment of it. The evidence disproves any such defence. The defence rests principally on two grounds:—1st, that the bill was multifarious, by making a case against Richardson, with which the defendant Dunn had nothing to do; and 2ndly, that the plaintiff could not support a bill without Richardson. The defence, I think, fails on both grounds. As to the first, it is true that much of the expense of the suit has arisen from the case made against Richardson, to which the defendant Dunn ought not, under any circumstances, to be subjected; but it would be premature to

make any arrangement with regard to costs at this time. Independently of this objection being raised at the hearing, the case against Richardson is not one unconnected with the relief prayed against Dunn, but in this it is indisputably connected with it, and it would be impossible to carry into effect any decree for a specific performance, without considering the question between the plaintiff and Richardson. It has not unfrequently happened that bills for specific performance have become necessary, to dispose of some collateral question with one party, another party, claiming under a subsequent agreement, being sometimes necessarily made a defendant, because the plaintiff may claim the benefit of an agreement for a payment made to such other person; and if the plaintiff claims the benefit of this, he must make that other party a defendant. It is enough if the plaintiff have sufficient interest in the subject-matter of the suit. It is no objection to the suit that others have also an interest, if they be brought before the Court, it not being necessary that all should concur in the demand as plaintiffs; for one of several parties having joint interests, or one of several residuary legatees, or one of several obligees, may sue, making the other parties interested defendants. It was, however said, that Richardson had accepted the title, so that the plaintiff was thereby bound. I find no proof of that fact; and if it were so, it would not, I think, afford an answer to the plaintiff's right to have a good title proved. The correspondence proves a continued demand on the part of the plaintiffs, and a tardy acquiescence in the demand on the part of the defendant. The decree must be the usual decree, with a reference as to the title. The subsidiary contract, and the defendant Dunn's occupation of the house and three closes at a fair annual rent, afford no impediment to the specific performance of the contract. If the contract be to be performed, there will be no more difficulty in ascertaining what the rate of payment ought to be, than frequently occurs in ascertaining the value of timber and other matter incidental to the performance of a contract. The decree cannot go further, until it is ascertained whether the defendant can make a good title.

M.R. }
July 13. } *In re* THE FOWEY CHARITIES.

Charity—Information—Petition—Stat. 2 Will. 4. c. 57.

A petition presented under the 2 Will. 4. c. 57, and praying for a reference, for the appointment of new trustees, and for the approval of a scheme, and for an inquiry as to the charity property, and in whom the legal estate was vested—was objected to, upon the ground that it ought to have been intitled in Sir Samuel Romilly's Act (52 Geo. 3. c. 101). The objection was overruled.

This was a petition presented by the Attorney General, intituled, "In the matter of the Town lands of the Borough of Fowey, the free school, John Treffye's charity, and Nicholas Sawle's charity; and in the matter of the 2 Will. 4. c. 57." (1)

The petition stated the manner in which certain hereditaments had become vested in trustees, upon charitable trusts,

(1) "An Act to continue and extend the Provisions of an Act passed in the Fifty-ninth Year of his Majesty King George the Third, for giving additional facilities in applications to Courts of Equity, regarding the management of estates or funds belonging to Charities, and for making certain provisions respecting estates or funds belonging to Charities."—This act of 59 Geo. 3. c. 91. enacted, among other things, "That whenever, upon any examination or investigation taken or had by and before the commissioners appointed or to be appointed, under the authority of the before-mentioned acts, any case shall arise or happen in which it shall appear to the said commissioners that the directions or orders of a court of equity are requisite for the remedying of any neglect, breach of trust, fraud, abuse, or misconduct in the management of any trust created for any charitable purposes as aforesaid, or of the estates or funds thereto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof, it shall and may be lawful for the said commissioners, or any five or more of them, if they shall think fit, to certify the particulars of such case, in writing, under their hands, to his Majesty's Attorney General, and thereupon it shall be lawful for his Majesty's Attorney General, if he shall so think fit, either by a summary application, in the nature of a petition, or by information, as the case may require, to apply to or commence a suit in his Majesty's High Court of Chancery, or to or in his Majesty's Court of Exchequer, sitting as a court of equity, stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case may require."

for the benefit of the inhabitants of Fowey, and also the manner in which other hereditaments had become vested in the corporation. No new trustees had been appointed upon the death of the original trustees, and the corporation of Fowey had now become dissolved.

The petition also stated, that an information and supplemental information had been filed respecting these charity estates, and that other proceedings respecting them had taken place in the Court of Chancery; and it prayed that it might be referred to the Master to approve of new trustees of the said charity estates, and to approve of a scheme for the said charities, and that it might be ascertained of what the said property consisted, and in whom the legal estate in the landed property was now vested. The particulars stated in the petition had been certified by the charity commissioners.

The MASTER OF THE ROLLS made the order as prayed, but the registrar objected to draw up the order, on the ground that the petition ought to have been intitled in the 52 Geo. 3. c. 101 (Sir Samuel Romilly's Act).

The petition was therefore again mentioned to the Master of the Rolls, when his Lordship held the objection to be unfounded, and directed the order to be drawn up.

Mr. Pemberton and *Mr. Blunt* appeared for the Attorney General.

M.R. }
July 22. } TAYLOR V. HEMING.

Practice.—Production and Inspection of Documents.

A plaintiff set forth in a schedule to his bill, a list of letters written by a defendant, the contents of which were not stated in the bill. These letters formed a part only of the correspondence, and all the letters were in the plaintiff's possession. The Court granted the defendant a month's time to answer, after he should have had an inspection of the letters mentioned in the schedule, (such inspection to be had within a week,) but refused to make an order for the production of those letters, or to make any order respecting

the letters which were not mentioned in the schedule.

The bill stated some transactions between two of the defendants (Messrs. Heming & Needham) and a Mr. Holmes, and set forth some letters which had passed between those parties. It then contained the following allegation, that the plaintiff "hath, in fact, discovered various other parts of the written correspondence between the said parties, that is to say, letters from the said defendant J. S. Needham to the said George Holmes; and the plaintiff is ready and willing to deposit the same, if required, for the purposes of this suit, with his clerk in court, or to permit inspection thereof by the defendants hereto; but the plaintiff hath, in order to avoid the expense of setting the same out in this, his bill of complaint, set forth in the schedule hereto annexed a list or schedule of such letters by date, and to which the plaintiff craves, if required, to refer." About twenty letters from Needham to Holmes were mentioned in the schedule, with their respective dates.

The solicitor of the defendants Heming and Needham, had applied to the plaintiff's solicitor, for copies of the letters referred to in the preceding allegation, and he received copies of the letters which were mentioned in the schedule. Some of the dates of these copies did not agree with the dates as stated in the schedule, but this difference was stated to have accidentally arisen in the copying. It appeared from the correspondence which took place between the solicitors, that the plaintiff had in his possession other letters between those defendants and Holmes, besides those which were mentioned in his schedule, which letters he refused to allow the defendants to have copies of. Under these circumstances, a motion was now made on behalf of the defendants Heming and Needham, that the plaintiff might, within seven days after service of the writ of execution of the order to be made on this motion, deposit upon oath with his clerk in court, the letters referred to in his bill and the schedule thereto, and also all other letters written by the said defendants, or either of them, to Holmes, and Holmes, Taylor, & Co., or either of them; and

that the defendants might be at liberty to inspect the same, and take copies thereof; and that the defendants might have a month's time to put in their answer after such letters should have been so deposited.

Mr. Pemberton and *Mr. W. S. Daniel*, appeared in support of the motion, and—
Mr. Rogers opposed it.

The Princess of Wales v. the Earl of Liverpool, 1 Swanst. 114;

Shepherd v. Morris, 1 Beav. 175; s. c.

8 Law J. Rep. (N.S.) Chanc. 86; were cited.

THE MASTER OF THE ROLLS.—This was an application of a description which is not very often made. This is the only case which has come before me, and there are few cases in the books. It is a motion which is quite founded on justice, when the circumstances of the case render it proper to grant the application.

The plaintiff, by his bill states, that he has in his possession certain documents which he does not set forth, not because they are not material to be known, and not a material part of his case, but on account of the expense; and he offers to produce or deposit them. The question which is raised in this case is, whether he is to exclude the defendant from that which he offers by his bill, and still go on with the process of the court, to compel the defendants to put in their answer. I am of opinion, that there is sufficient authority for saying he is not entitled to do that. If he refers in his bill to documents in his possession, whether he does or not offer to produce them, still they are part of his case, and he cannot call on the defendant to answer, till he has seen the documents which are necessary for his answer. The Court has acted on it from the earliest period, and *The Princess of Wales v. the Earl of Liverpool* is not the first case on the point. Judges of great experience have said, that they could never understand on what principle the case was founded; but I believe it is founded on the principles on which, upon examination, it could be supported. What is asked in this case is, that the plaintiff shall produce the documents. I am of opinion, that I have no jurisdiction to grant that.

The next part of the application is, that

the defendant may have a certain time to answer after the documents have been produced. This is what the Court has done before, and which is expedient in cases which fall within the rule. The plaintiff has set forth some letters, and referred to other letters. It is contended, that by his bill, he leaves it to be inferred, that there are letters, part of his case, which are not referred to in his schedule. I cannot arrive at this conclusion. I must consider that he means those letters to which he has referred, as the letters mentioned in the bill. It is of course, therefore, that the defendant should have full inspection of those letters before he is called on to answer. Those of which copies have been given, are not of the same dates as those in the schedule. It is stated in the correspondence, that this is a mistake. This may be so. I think the defendant has a right to know whether this is a mistake, and has a right to an affidavit of the plaintiff, or the parties employed by him, that he has had copies of these letters, and that he ought to have an inspection of them, which is not disputed; and I think the defendant, besides the inspection, has a right, if he asked for it, to have it explained in affidavit, and to see that these letters did not correspond, in point of date, with those which are in the schedule. But there is a subsequent correspondence, by which, it appears that there are other letters which are not stated in the schedule, letters forming part of the correspondence, but not the case of the plaintiff, as made by the bill. However inconvenient, I am of opinion, that according to the rule of the court, I cannot order the plaintiff to produce them, or stay the progress of the suit till they are produced. It may be inconvenient, and render a cross-bill necessary, but there is not, on the record, a statement that the plaintiff has these documents in his possession. If a cross-bill were filed, there might be sufficient ground for a motion to stay the proceedings in the first suit, till all the correspondence was produced. I think the rule of the court compels me to abide by the record. I, therefore, cannot grant that part of the application. It must be confined to an inspection of the documents and an affidavit, which is to prove the identity between

the documents produced, and those which are mentioned in the schedule; and the defendant is entitled to one month's time to answer, after the production of the documents and the affidavit, and to be at liberty to inspect the letters within a week. No costs of the motion.

M. R. }
July 20, 22. } BRETT v. HORTON.

Construction—Legacy—Residue.

A testatrix directed the rents of certain estates to be divided equally between four persons, (one of whom was S. B., the widow of W. B.) until all the children of W. B. should attain twenty-one. The estates were then to be sold, and the produce divided equally between the three former legatees, and the children of W. B. who should attain twenty-one. And the testatrix bequeathed the residue of her estate, to be equally divided between the same three persons and the children of W. B. who should attain twenty-one:—Held, that the children of W. B. who attained twenty-one, were entitled to one-fourth share of the residue, to be equally divided among themselves.

Ann Brett, by her will, dated the 24th of January 1830, after directing a particular part of her real estate to be sold, directed her trustees to pay and divide the rents of the remaining part of her estates, "equally between her sister, the wife of Richard Bodington, her niece Sarah, the wife of John Bodington, and Sarah Brett, the widow of her late nephew William Brett, and her niece Ann Jones, until all the children of her said nephew William Brett should attain twenty-one years, or die under that age, which should first happen." And she directed her trustees to sell the last-mentioned real estate, and pay and apply the money arising from such last-mentioned sale, "unto and equally between her sister, the wife of Richard Bodington, her niece Sarah, the wife of John Bodington, the child and children of her said nephew William Brett who should attain the age of twenty-one years, and her niece Ann, the wife of John Jones, and their respective executors, administrators, and assigns, in equal shares and proportions, as tenants

in common." Provided, that in case the widow of William Brett should marry again, she directed her trustees, immediately thereupon, to pay her part of the income of the remaining part of the farms, &c., before directed to be paid to her, for the maintenance and education of the child or children of William Brett, who should be then living. And the testatrix devised and bequeathed the residue of her property, both real and personal, "unto and equally between her sister, the wife of Richard Bodington, her niece Sarah, the wife of John Bodington, the child and children of her said late nephew William Brett, who should live to attain twenty-one, and her niece Ann, the wife of the said John Jones, their respective heirs, executors, administrators, and assigns."

The testatrix died in 1830. The suit was instituted to have the trusts of the will carried into execution. The testatrix's nephew, William Brett, had four children, three of whom (infants) were the plaintiffs in the suit. A question was now raised, whether the produce of the testatrix's estate was to be divided into fourth parts, and one of those parts to be divided among the four children of William Brett; or whether the produce of the estate was to be divided into seven parts, and one of them given to each of the four children, and to each of the three other legatees.

Mr. Pemberton, Mr. Kindersley, Mr. Lloyd, and Mr. Elderton, appeared for different parties.

Butler v. Stratton, 3 Bro. C.C. 367.

Weld v. Bradbury, 2 Vern. 705.

Blackler v. Webb, 2 P. Wms. 383.

July 22.—The MASTER OF THE ROLLS decided, that the children of William Brett were entitled to one-fourth; which was to be divided among such of them as should attain twenty-one.

V. C. }
July 22. } WARNER v. MOORE.

Mortgage—Order 5, May 9, 1839, Construction of—Preliminary Inquiry—Foreclosure Suit.

The Court will not, under the 5th order of the 9th of May 1839, direct an inquiry,

in a suit for foreclosure, of who was the heir-at-law of a party who was entitled to the equity of redemption of the mortgaged premises.

This was a mortgagee's suit, and prayed foreclosure. A motion was made on behalf of the plaintiff, that it might be referred to the Master to inquire who was or were the heir or heirs-at-law of John Baldwin and — his wife, the testator and testatrix in the pleadings named.

Mr. James, for the motion, referred to order 5, May 9th, 1839. — The inquiry asked, would facilitate the making of the decree in the cause, as the effect might be, to shew that the defendant before the Court in the character of heir, was not, in fact, the heir, and in that case, the bill might be dismissed against him, and the proper party made defendant.

Mr. Anderdon, contra.

The VICE CHANCELLOR [after reading the material part of the order]. — It is plain that the preliminary inquiries contemplated by the order, are such as will be beneficial to the parties to the cause at the hearing. If they are not apparently beneficial, they can only be made by consent. The object of the inquiry asked by this motion, is not, however, an inquiry obviously beneficial to any party, but one which is to enable you to strike off some party from the record. The object of the order is, to facilitate the hearing, as against the parties to the record, not to strike off any of such parties.

Motion refused, with costs.

M.R. }
July 27, 28. } GRIFFITH V. BLUNT.

Legacy—Construction—Remoteness.

A testatrix directed a share of her residuary estate to be accumulated for the benefit of all the children of her two nephews, in equal shares, to be vested interests, in sons at twenty-five, and in daughters at twenty-five or marriage:—Held, that this bequest was too remote, and was consequently void.

Ann Dimsdale, the testatrix in this cause, by her will, dated the 23rd of March 1830, after disposing of two third

parts of the residue of her personal estate, directed the remaining one-third to be paid over to three trustees, upon trust to invest the same as therein mentioned, and accumulate the interest thereof, and to stand possessed of the trust fund, and accumulations, upon the following trusts: "In trust for all and every the child and children of my two nephews, Thomas R. Dimsdale and Charles J. Dimsdale, equally to be divided between or amongst them, if more than one, share and share alike *per capita*, and not *per stirpes*, the share or shares of such of them as shall be a son or sons, to be an interest or interests vested in him or them respectively, at his or their age or respective ages of twenty-five years, and the share or shares of such of them as shall be a daughter or daughters to be an interest or interests vested in her or them respectively, at her or their age or respective ages of twenty-five years, or day or respective days of marriage, with the previous consent of her or their parents or guardians, which shall first happen. And if there be but one such child, then to such only child, his or her executors, administrators, or assigns, absolutely, to be paid to such child, if a son, on his attaining the age of twenty-five years, or if a daughter, on her attaining that age, or on her marriage with such consent as aforesaid, which shall first happen. Provided always, and my will is, that if any of the said children, being a daughter or daughters, shall die under the age of twenty-five years, without being or having been married, or if any of them, being a son or sons, shall depart this life under the age of twenty-five years, then and in such respective cases, the shares of the legatees so dying as aforesaid, shall go and accrue to the survivors or survivor of the children of my said two nephews, who shall be entitled to the remaining part of the said one-third part of the residue, share and share alike; and the share or shares surviving or accruing to the survivors or survivor of the said children, shall become vested in and be transferable to such survivors or survivor respectively, at such time or respective times as hereinbefore directed, concerning his, her, or their original share or shares, and such benefit of survivorship and accruer shall extend as

well to the surviving and accruing as to the original share or shares."

The testatrix executed several codicils to her will, one of which was dated the 24th of September 1830; and the testatrix thereby, after reciting the disposition which she had made of her residuary personal estate by her will, revoked the said disposition, and, instead thereof, directed that her residuary personal estate should be divided into five equal parts. And she gave two of such five parts unto her nephew, the Honourable Thomas Robert Baron Dimsdale; two other of such five parts unto her said nephew, Charles J. Dimsdale, and as to the remaining one-fifth part thereof, she bequeathed the same "to and among the children of her said two nephews, in the same manner, and subject to the same limitations and conditions, as directed by her said will, with respect to the third part thereby given, to and amongst the said children, as therein-before mentioned."

The testatrix died in 1832.

This suit was instituted in June, 1840, by the children of Thomas R. Dimsdale and Charles J. Dimsdale, all of whom were under the age of twenty-five, the youngest of them being twelve years old. One daughter of Thomas R. Baron Dimsdale had married with the consent of her father.

The cause now came on for further directions; and it was insisted by the next-of-kin of the testatrix, that the gift to the children was void for remoteness.

Mr. Tinney and *Mr. Calvert* appeared for the plaintiffs; and—

Mr. Pemberton, *Mr. Kindersley*, *Mr. Girdlestone*, and *Mr. Piggott*, for different defendants.

Blease v. Burgh, 2 Beav. 221; s. c.

9 Law J. Rep. (N.S.) Chanc. 226;

Ring v. Hardwick, 2 Beav. 352; were cited.

July 28.—The MASTER OF THE ROLLS said, that the language of the will was free from any ambiguity as to the intention of the testatrix, and that, in particular, the gift to an only child, if there should be no other issue, shewed clearly that those only who attained twenty-five were intended to take. The limitation was therefore too remote, and could not be supported.

M.R. { THE ATTORNEY GENERAL v.
July 15; { KERR.
Aug. 2. { THE ATTORNEY GENERAL v.
WAILES.

Charity—Information—Relator's Costs.

The usual costs allowed a relator in a charity information, in which he has been successful, are only costs as between solicitor and client, and he is not entitled to the costs, charges, and expenses incidental and preparatory to the information, unless a special case is made out, and established by evidence, to the satisfaction of the Court.

The costs of a testator, in a successful information (in the first instance, at least), must be a charge on the fund or estate, recovered by the information, and not be paid out of the general funds of the charity derived from different estates.

This was an information in which a decree was made by the Master of the Rolls, on the 16th of March 1840, setting aside certain leases; and the decree (amongst other things,) directed the extra costs of the relator to come out of the charity estate. The trustees of the charity did not attend the settling of the minutes of the decree, which, as finally agreed upon between the relator's agent and the agent of one of the defendants, and drawn up, contained an order directing that the relator should be allowed his costs, charges, and expenses, incidental and preparatory to the information, and that the amount thereof, and of certain other sums therein particularly mentioned, should be paid out of the general charity funds in the hands of the trustees, and not out of the particular estate or fund, the subject of the information.

Mr. Bethell, and *Mr. Whitworth*, for the trustees, appeared in support of an application to vary the decree as drawn up, so that the costs of the relator might be limited to his costs as between solicitor and client only, and, be directed to be paid not out of the general funds in the hands of the trustees of the charity, but out of the particular estate, the subject of the information.

Mr. Pemberton, *Mr. G. Turner*, and *Mr. O. Anderdon*, contra, urged, that, in the present case, it was apparent on the pro-

ceedings that the relator, who stood in the situation of a trustee, had sustained many costs, charges, and expenses over and above his ordinary costs of the information, and that he ought to be allowed them, inasmuch as he ran great risk, must necessarily consult counsel, and could not, with any safety to himself, approach the Court, without taking that preliminary step; and—

The Attorney General v. Winchester,
3 Law J. Rep. Chanc. 64;

The Attorney General v. the Skinners' Company, Jac. 629;

The Attorney General v. the Cloth-makers' Company, May 2, 1833;*

The Attorney General v. Nethercoat,
January 29, 1841;*

The Attorney General v. Harpur,
February 1839;*, and

The Attorney General v. St. David's,
April 19, 1838;*

were cited.

It was also contended, that the extra costs of the relator, i. e. his costs, charges, and expenses, ought to be paid out of the general funds of the charity.

THE MASTER OF THE ROLLS.—These causes came on to be re-argued upon that part of the decree by which it was ordered that the relator should have his costs, charges, and expenses of, incidental, and preparatory to those causes, and that the amount of the costs, and certain other sums, should be paid by the trustees out of the funds of the charity.

It is alleged, on behalf of the trustees, that there is no rule of this court giving the relator such costs as he has obtained in the present case, and that the amount of what may be payable by the trustees ought to be paid out of the estate, the subject of the suit, and not out of the general funds of the charity.

On behalf of the Attorney General and the relator, it has been argued, that the relator is entitled to such costs, charges, and expenses, by the general course of practice in this court, and several cases in which such costs, charges, and expenses have been allowed, were cited at the bar.

It appears to me, that the practice of

making such allowance is of very recent origin, and that it is not a matter of course to make it. I think the order made by Lord Eldon, in the case of *The Attorney General v. the Skinners' Company*, and the order made by Sir John Leach, in the case of *The Attorney General v. Winchester*, must have depended upon the particular circumstances of those cases, which were of a complicated and special nature. The subject was not brought under the consideration of the Court in any of the other cases cited.

Sir John Leach seems to have considered that a relator was to be looked upon in the situation, in some sense, of a trustee, and there are several cases in which the allowance to the relator has been given, as between solicitor and client. Those cases are sufficient to shew that there was no general rule to allow costs, charges, and expenses. One of those cases was *The Attorney General v. the Goldsmiths' Company*, which was determined in June 1833; and in the case *The Attorney General v. the Fishmongers' Company*, which afterwards occurred before me, I had occasion to consider how far the relators in a charity information were entitled, as a matter of right, to costs, as between solicitor and client; and being of opinion that he was not so entitled, I thought it right in that case to give him the costs, as between party and party only.

Upon considering the cases that have occurred, it appears to me, the relator in a charity information, where there is nothing to impeach the propriety of the suit, and no special circumstances to justify a special order, upon obtaining a decree for the charity, is entitled to his costs, as between solicitor and client, and to be paid the difference between the amount of such costs and the amount of costs he may recover against the defendants out of the charity estate.

There may be special cases in which the relator may be entitled to charges and expenses, in addition to the costs of the suit, as between solicitor and client; but I am of opinion that such must depend upon the peculiar circumstances to be brought forward, and established by evidence on the proper occasion. Upon the second point, I find there are several cases in

* Not reported on the point before the Court.

which the costs to be paid by the trustees of a charity have been ordered to be paid out of the funds of a charity generally; but the trustees objecting to it, it appears to me more regular and proper, in the first instance at least, to charge the costs of the information on the funds of the estate, the subject of the suit. It may happen that justice to the relator, or the interests of the charity may require a different provision, which different provision must be made when the case requires it, and not otherwise.

I am therefore of opinion, that the decree must be varied in the particulars complained of; and that the relator, instead of being allowed his costs, charges, and expenses of, and incidental and preparatory to, these causes, properly incurred, is only to be allowed his costs of this suit as between solicitor and client, and therefore that the costs and sums to be paid by the defendants, the trustees, instead of being directed to be paid out of the funds of the hospital generally, ought to be declared to be a charge on the property, the subject of the suit, and to be raised by sale or mortgage of that property.

Under the decree as it stood, the costs of the relator have been already taxed, and the effect of the variation now made will be to make a new taxation necessary. The additional costs of taxation cannot be imputed to the relator alone; for although it does not appear, with respect to the claim, in conformity to the words introduced into the decree, that any such claim was made to the Court, yet the words were introduced into the decree, and well known to both sides before the decree was settled. I think, therefore, in this respect, that both sides were acting in error. Whether any allowance for the costs of such taxation ought to be made, cannot be determined, either on the rehearing of the case, or on the petition presented for raising and paying the costs already taxed, but must, if necessary, be the subject of future consideration.

Upon the petition already presented, I think no order whatever, as to these costs, can be made.

L. C. }
Jan. 13, 14; } RICHARDS v. PLATEL.
Aug. 11. }

Lien—Solicitor—Papers—Contract—Practice—Appeal—Insurance.

A solicitor's lien on his client's papers for the amount due to him in respect of professional services, is equivalent to a contract; and the Court will not order the papers to be delivered up to the client, merely on payment into court of the amount due to the solicitor.

Semble, however, that the Court would take care that the lien of a solicitor, on a document, should not be productive of injury to or loss of the property to which the document related, and would direct it to be delivered up, if such a step were necessary for the preservation of the property, but without prejudice to the solicitor's lien thereon, and, in the case of a policy of assurance, would order the proceeds arising therefrom to be paid into court, subject to the same right of lien thereon as previously existed on the policy.

The appeal to the Lord Chancellor from an interlocutory order, made on petition in the court below, is not an appeal within the meaning of the 42nd of the orders of 1828.

This was an appeal, by the defendant, from an order of the Master of the Rolls, directing the defendant to deliver to the plaintiffs several policies of assurance. The plaintiffs were the surviving executors and trustees named in the will of a person named Bull, and employed the defendant as their solicitor and agent in the executorship affairs, and as the receiver of the rents of certain parts of the testator's estates, from the time of the testator's death in 1827 till the year 1836, and whilst acting in such capacity, a sum of 512*l.* 7*s.* 2*d.* became due to the defendant from the plaintiffs, and three documents, being policies of assurance on lives, came into the defendant's possession, on which he claimed a lien, in respect of his professional services. In 1839, the defendant brought his action against the plaintiffs for the recovery of 512*l.* 7*s.* 2*d.*, the balance alleged to be due to him from the plaintiffs, whereupon the plaintiffs filed their bill, praying an account of the monies received and

paid by the defendant, as the solicitor and agent of the plaintiffs; and that, on the plaintiffs' payment of the amount due to the defendant, he might be ordered to deliver up to the plaintiffs, or their solicitor, the three policies of assurance, and all other papers and writings in his possession, relating to the testator's real and personal estate and effects, and that the defendant might, in the meantime, be restrained from proceeding in his action. The defendant, in his answer to the plaintiffs' bill, (amongst other things) admitted that he had refused to render any accounts to the plaintiffs until his bill was paid; and stated, that his reason for such refusal arose from his belief, that the plaintiffs intended to make an unfair use thereof in certain proceedings at law, which they were about to institute against the defendant. In the month of February 1840, an injunction was granted against the defendant, restraining the proceedings in the action against the plaintiffs, on their paying the sum of 512*l.* 7*s.* 2*d.* into court; after payment by the plaintiffs of the 512*l.* 7*s.* 2*d.*, they applied to the defendant to deliver up the three policies (the life, in respect of which one of the policies was effected, having dropped), but the defendant refused to comply therewith; and on the 7th of August 1840, the Master of the Rolls, on an application made to him on the part of the plaintiffs, ordered the three policies to be delivered up by the defendant to the plaintiffs, within one week.

Mr. Bethell and *Mr. O. Anderdon*, in support of the appeal.—The defendant is entitled not only to the sum paid into court, but interest thereon, and his costs, and the three policies are a security for the same, so that it is very possible the sum paid into court may eventually prove to be not nearly sufficient to satisfy the defendant's just demands. At common law, if a defendant pays into court a sum of money in a cause in satisfaction of the plaintiff's demand, the plaintiff may, on application, have the amount so paid in by the defendant, paid out to him, together with his costs up to that time; but there is no such rule in equity. The circumstance of a solicitor having a passive interest, and only a mere lien on documents in his possession, until his debt is satisfied, renders it proper

that the Court should render him its fullest protection—*Steadman v. Webb* (1); and a mortgagor, by merely paying the amount due to the mortgagee into court, cannot insist on a re-conveyance—*Postlethwaite v. Blythe* (2). The order of the Master of the Rolls is in reality in the nature of a decree made on petition.

Mr. J. Wigram and *Mr. Tennant*, for the appeal, contended, that there was no analogy between the present case and the case stated on the other side, of a mortgagor paying the mortgage money into court; that it had been decided, that a solicitor cannot retain his client's papers after he had had a satisfactory indemnity tendered to him—*Mills v. Finlay* (3); and that the present case was stronger in its circumstances than *Mills v. Finlay*, for here the defendant had capriciously refused to deliver to the plaintiffs his accounts; and that *Clutton v. Pardon* (4) was an authority for the production at least of that policy; the life having dropped in respect of which it was effected, and the amount thereof being therefore immediately payable.

Mr. Bethell, in reply, stated, that the case of *Mills v. Finlay*, if correctly reported, could not possibly be supported, being inconsistent with the doctrine laid down by Lord Eldon in *Lord v. Wormleighton* (5).

The LORD CHANCELLOR said, the case was one of importance, considering the recent decision of the Master of the Rolls on the subject; that there could be no distinction between the case of a solicitor, who claims a lien on the papers of a client in his possession, and that of a factor, creditor, or other person holding a security for a debt; that liens existing by means of a rule of law, or by the custom of trade, were equivalent to contracts, and no reasonable distinction could be drawn between the two; that if the money due could, in the present case, be substituted for the documents, he could not see why the Court

(1) 8 Law J. Rep. (N.S.) Chanc. 193.

(2) 2 Swanst. 256.

(3) 1 Beav. 560.

(4) Turn. & Russ. 301. *Vide* the observations, p. 304.

(5) Jac. 580.

should not also inquire into the value of the documents themselves, which it would certainly not take upon itself to do. In the case of *Clutton v. Pardon*, Lord Eldon says, "Every attorney has a right to hold papers till his bill is paid. The language of every order which is made on the subject is, that, on payment of what is due, the papers shall be delivered over; but where a party has a *pressing necessity* for papers, the Court will order them to be delivered up, on a deposit being made, which will cover not only what is due upon the bill, but what may be due for the costs of the taxation." He did not understand what was meant by the term "*pressing necessity*," in Lord Eldon's judgment; but that in *Postlethwaite v. Blythe*, that learned Judge expresses himself in far more general words when he says, "I take it to be contrary to the whole course of proceedings in this court to compel a creditor to part with his security till he has received his money; nothing but consent can authorize me to take the estate from the plaintiff before payment." His Lordship concluded his observations with stating, that in such a state of the authorities he must look into the question.

On the following day, his Lordship discharged the order of the Master of the Rolls as a matter of right, stating that it might be a serious inconvenience and hardship to the plaintiffs to be kept out of the possession of the documents till the accounts had been taken between the parties, and the balance due had been ascertained: that as to one of the policies there had certainly been a pressing necessity for its delivery to the plaintiffs, to enable them to obtain payment of the amount due on it; and the Court would take care that the lien of the solicitor should not be productive of injury to the plaintiffs by loss to the property, but would, in such a case, order the policy to be delivered up for the purpose of the sum due thereon being recovered, and would direct that sum to be paid into court to answer the defendant's lien; but the money due on the policy, in which the life had dropped, had been received by the plaintiffs, and they were in the possession of the other two policies, so that the discharge of the order

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(which is the only thing prayed by the petition,) would not have the effect of causing either the money to be paid, or the two policies to be brought back, but it might form the foundation of a further application to the Court.

In the same appeal, the Lord Chancellor, on an application made to his Lordship by Mr. Anderdon (some months before it came on to be heard), that the petition of appeal might be answered as an original petition, stated, that a petition to discharge an interlocutory order made on a petition in the court below, was a new petition, and similar to the renewal of a motion, and not to be considered as a petition of appeal, and did not come within the 42nd order of April 1828, as to the deposit payable on the presentation of petitions for re-hearing.

August 11.—On this day his Lordship observed, that when the case came originally before him on the petition of the defendant, to stay the order of the Master of the Rolls, he suggested that an immediate decree for an account should be taken between the parties, which was agreed to; the defendant, however, was apprehensive of the order of the Master of the Rolls being acted on in the meantime, and applied for the deposit of the policies in court; but the order of the Master of the Rolls could not be acted on whilst the decree was in course of prosecution, for the order of the Master of the Rolls having been discharged, the parties must be restored to their original position; and it was quite a matter of course, that the documents should be deposited in court.

V.C. }
May 27; }
June 17; } HOBHOUSE v. COURTNEY.
July 7. }

Practice.—Substitution of Service—Agent—Power of Attorney, general and special.

Where it appears that the agent of a defendant abroad has a special power, enabling him to act on behalf of his principal, and to prosecute and defend any suits in respect of the subject-matter of the cause, the Court will order that service of the subpoena to ap-

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pear and answer the bill, upon such agent, shall be deemed good service of his principal.

Emilia Sheil, of Xeres, in Spain, consigned certain wines to this country, where they were warehoused in the name and custody of the defendant Courtney. By means of advances to, or on an account of the consignor, the plaintiffs acquired or claimed a lien upon the wines. Widow Sheil became bankrupt, and the defendants Miguel de Giles, and Fulgencio de Perea, were by the proper authorities in Spain appointed assignees of her estate. The assignees executed a power of attorney, enabling Patrick M'Mahon, a native of Spain, to act in England on their behalf, in respect of the wines, and to sue and defend any actions or suits as might appear to him necessary, for the purpose of recovering possession of them. Soon after M'Mahon arrived in England for the purpose of acting under his power, the plaintiffs filed their bill against Courtney, and the assignees under the bankruptcy, to give effect to the said lien; and they applied by motion, that service upon M'Mahon might be good service on his principals abroad. Upon affidavit of the circumstances to the effect above stated, the Vice Chancellor ordered, that service of process of subpoena for the defendants Miguel de Giles and Fulgencio de Perea, to appear and answer the plaintiffs' bill, on the said Patrick M'Mahon, be deemed good service upon the said defendants, Miguel de Giles and Fulgencio de Perea. Notice of motion was afterwards given, on behalf of the said defendants, that the order for substituting service might be discharged.

Mr. Wigram and Mr. Anderdon, for the defendants, in support of the motion.

Mr. K. Bruce and Mr. Sharpe, for the plaintiffs, in support of the order.—The cases cited were—

Rickcord v. Nedriff, 2 Mer. 458.

Smith v. Hibernian Mine Company, 1 Sch. & Lef. 238.

Waterton v. Croft, 5 Sim. 502; s. c. 4 Law J. Rep. (N.S.) Chanc. 7.

Roberts v. Worsley, 2 Cox, 389.

Bond v. Duke of Newcastle, 3 Bro. C.C. 386.

English v. Kendrick, 6 Madd. 205.

Wellings v. Lomans, 2 Dick. 579.

Anderson v. Lewis, 2 Dick. 776.

Gildenichi v. Charnock, 6 Ves. 171.

Carter v. De Brune, 1 Dick. 39; s. c. *infra*, p. 382.

Hyde v. Foster, 1 Dick. 102; *infra*, p. 382.

Carrington v. Cantillon, Bunb. 107.

Hales v. Sutton, 1 Dick. 26; s. c. *infra*, p. 381, nom. *Hallett v. Sutton*.

THE VICE CHANCELLOR.—In this case an order was made, directing that service on M'Mahon, of the subpoena to appear to the plaintiffs' bill, should be good service on certain persons who were made parties to the bill, on the allegation, that the plaintiffs had claims on wines consigned to this country, by the house of Sheil, of Xeres, in Spain. That firm became bankrupt, and the defendants, residing at Xeres, were made assignees by the Chamber of Commerce there. M'Mahon, it was said, had received a power of attorney to act for them in this country. In proof of this fact, there was an affidavit alleging, that the solicitor of the defendants represented that the power of attorney was of the most extensive kind, enabling M'Mahon to prosecute and defend any suits in this country in relation to the rights of the assignees, and also to the claims of the plaintiffs. This affidavit was, upon the application to discharge the order for substituting service, opposed by a joint affidavit, made by M'Mahon and Mr. Annesley, his solicitor. I have read the affidavit; it does not deny the principal fact, that the power of attorney had been given. On the other side a further affidavit was made, stating the fact, that since the service of the order of the 27th of May on Mr. M'Mahon, he, M'Mahon, had written to Messrs. Moore & Hanson, of Bristol, a letter to this effect:—"Gentlemen,—The authority that the power of attorney, the assignees of the failed house of widow R. Sheil have conferred upon me for liquidating the property you hold of shipments of wines she consigned to you, being recognized to be sufficient for any proceedings I may consider necessary to undertake in the courts in this country, on behalf and in the name of the said assignees of Mrs. Sheil, I take the liberty to request you will be pleased to furnish me with the requisite accounts of all the property and monies in your hands, and the disposal

thereof, amounting as per annexed statement." The representation in this letter is a further confirmation of the first statement, that M'Mahon has not merely a power from the assignees to act generally, but also to act specially as to those wines in this country. The question then is, whether the order for substituting service of the subpoena is wrong? The first case I shall advert to, is that which has been cited from *Dickens's Reports*, p. 26, and the facts are certainly correct, although the case is reported under a somewhat different name. It is reported under the name of *Hales v. Sutton*, but the real name appears from the registrar's book to be *Hallett v. Sutton*. [His Honour read the entry of the case from the registrar's book, as stated below (1)]. Now, these facts do not substantially differ from the report in *Dickens*, which stands thus:—"The defendants, who were the executors of the testator in the cause, living abroad, gave a letter of attorney to a person to prove the will: service of a subpoena to appear and answer, on such attorney or proctor, held, to be good service on the defendants." Then, in 1 *Dick.* p. 39, there is a report of a case of *Carter v. De Bruyn*, misprinted *De Brune*, which occurred in 1722, in which it was ordered, that service on a person who transacted business for the defendant under a letter of attorney, should be deemed good service on the defendant. There is next the case of *Hyde v. Foster* (2), which was before Lord Hardwicke, of which I have a note from the registrar's book (3).—[His Honour read it.]—Now, it appears from these cases, that three different Chancellors, successively, Lord Cowper, Lord Macclesfield, and Lord Hardwicke, thought it right, where it appeared that the person who was appointed agent had special authority to act in the matter for an absent defendant, that service of the subpoena on that agent should be good service on the principal abroad. The case of *Gildenichi v. Charnock*, is not quite rightly stated in the report; but with a very little alteration, it may be made correct (4).—[His Honour read

the extract from the registrar's book.]—The defendant, therefore, had appeared, and had actually himself made two applications through his solicitors, so that they were acting as the agents for the absent defendants in the subject of the cause; and that being the substratum, Lord Eldon ordered service of subpoena. Then came the case of *English v. Kendrick*, where it appeared, that an injunction had been obtained, restraining the defendant and her agents until answer from getting in the estate of her deceased brother; and a motion was made, that service of the subpoena on the proctors of the defendants, who had acted for her in obtaining letters of administration of her brother's estate, might be deemed good service on the defendant. It was stated, that the case described as *Hales v. Sutton* had been searched for, and could not be found in the registrar's book; but the Court thought the plaintiff was entitled to the order.

Here we have five instances, during the period from 1717 to 1821, in which four Lord Chancellors, and a Vice Chancellor, have taken one uniform view of the practice. Then, it has been said, that this is to be disregarded, because a case differing from these is reported in *Bunbury*, as happening in the Exchequer; but the question here however is, the practice of this Court. It was also said, that all these authorities have been superseded, and that a different practice has been established in modern times. The case of *Roberts v. Worsley* has been adduced in proof of this statement. There, a defendant appeared and answered the original bill, the plaintiff afterwards amended, at which time the defendant was out of the jurisdiction of the Court. Upon motion that service of the subpoena to appear and answer the amended bill upon the defendant's clerk in court in the original suit, might be deemed good service upon the defendant, his Honour said, he was clearly of opinion that such an order could not be made. And then some general language is put into the mouth of Lord Kenyon, which, if he used, might have reference to the facts of the case, but the language as stated in the report is, I must say, contrary to the established law. It is this: "The Court will never appoint an attorney to act for a man without his leave,

(1) *Hallett v. Sutton*, *infra*.

(2) 1 *Dick.* 102; a. c. 2 *Mer.* 459, n.

(3) *Hyde v. Foster*, *infra*.

(4) *Geledneki v. Charnock*, *infra*.

except in the case of an injunction bill, where it would be gross injustice that one man should be prosecuting an unrighteous demand at law, and yet put himself out of the reach of the subpoena of this Court, in a cause instituted for the purpose of restraining such proceedings. But the present application was quite different: an amended bill might be altogether a new suit, in which it would be very improper to force an attorney upon the party without his consent. And his Honour said, he remembered several applications of a similar nature, but they had never been attended with success." The case, I apprehend, was rightly decided, because the person who was the clerk in court had no general authority from the plaintiff to act as his agent in the matter of the amended bill; he was merely the clerk in court, and did not stand in the situation of a person specially authorized to act in such a case. In *Bond v. Duke of Newcastle*, which is much the same sort of case, there had been a bill filed for a receiver of the amount of certain sums which had been allowed by the Commissioners of American Claims, by plaintiffs claiming under a marriage settlement. Bond was the holder of certificates issued by the commissioners on allowing these sums; and he claimed to hold the certificates, and to receive the monies payable on them as a purchaser for valuable consideration, without notice of the settlement. Upon filing his bill, he moved, that service on their clerk in court might be deemed good service upon the plaintiffs in the first bill, which the Lord Chancellor thought could not be allowed, —certainly not! The clerk in court was only so for the purposes of the suit in which the parties entitled under the settlement were plaintiffs, and not in the suit in which they were made defendants.

The next case is *Wellins v. Lomans*; the case as it stands in the book, is this:—"A defendant, a mortgagor, living or being about to go abroad, by an indorsement on the mortgage deed, agreed, in case he should not redeem by a limited time therein mentioned, that two persons therein named should accept a subpoena for him to appear and answer any bill that should be filed against him, touching the mortgage; the plaintiff having filed his bill to foreclose,

applied that the persons named might be served with the subpoena, which should be good service on the defendant. The motion was then denied." And then there is a note subjoined, that there were two cases mentioned, *Hyde v. Foster* and *Carter v. De Brune*. Now, I have a note from the register book of the last of these cases, it is this:—[His Honour read the extract from the registrar's book (5).]—The note also adds, that in the cases cited, it was either admitted or proved, that the persons served acted as attorneys or agents for the defendants; but, in this case, it did not appear that it was with the privity of the persons named in the indorsement, that their names were used, nor that they would accept a subpoena to appear for the defendant; for who would indemnify them? The case therefore seems to me to proceed on this, that there was no sufficient evidence of the fact, that these persons were specially appointed attorneys, and therefore it was quite right to deny that the service of subpoena on them should be good service. In *Smith v. Hibernian Mine Company*, a defendant, who was residing out of the jurisdiction, had given a power of attorney to a person to act for him in the management of his affairs. The Court refused to allow substitution of service of subpoena on the person to whom the power was given. Lord Redesdale, in giving judgment, alludes to a case which was argued before Lord Thurlow, where a person executing a mortgage, inserted a covenant, that if the mortgagee should be desirous of filing a bill of foreclosure after a certain time, service of subpoena on a person there named should be good service. On that ground an application was made to Lord Thurlow to substitute service, the mortgagor having gone to the East Indies; but the answer of Lord Thurlow was, "I can no more try the fact, whether there is such a covenant, without having the party before me, than I can decide any other facts, without the parties being before me." Lord Redesdale then adds, "And I remember his reasoning was, that the substitution of service directed by the legislature in several cases, would be quite unnecessary if this practice were allowed. That case was discussed with a

(5) *Carter v. De Bruyn*, *infra*.

considerable degree of attention, and I should imagine that those cases published by Mr. Dickens, were cited, but Lord Hardwicke must himself have altered his opinion since the time when those cases were decided. Mr. Dickens was a very attentive and diligent registrar, but his notes being rather loose, were not considered as of very high authority: he was constantly applied to, to know if he had anything on such and such subjects in his notes; but, if he had, the register books were always referred to." Lord Redesdale does not say, when or how or why he thought Lord Hardwicke had altered his opinion, but merely says he must have altered his opinion. All we really know is, that Lord Hardwicke had not altered his opinion, but had continued of the same opinion at the time he decided the case of *Hyde v. Foster*. Lord Redesdale then alludes to a case, where a bill was filed to sell an estate for payment of debts, and the heir-at-law, who was entitled to the surplus after payment of debts, was out of the jurisdiction. The Court ordered the estate to be sold; the heir might file a bill to set aside the proceedings if they were erroneous;—and though the heir-at-law had a mother and sister living in England, and in the habit of corresponding with him; yet there was no conception of substituting service. There could of course be no such substitution, unless the persons so in correspondence with the heir had a legal power to act for him in the particular subject to which the suit related. I think that the case of *Smith v. Hibernian Mine Company* has no resemblance to the present case, because there the agent had a power to act for the absent party generally in his affairs. The next case was in the year 1817, *Rickcord v. Nedriff*. There, one defendant resided out of the jurisdiction, and the other admitted, by his answer, that he had received a power of attorney from him to receive the arrears (if any) of an annuity, which it was the object of the bill to set aside. There the plaintiff moved on the admission in the co-defendant's answer: of course the application for substitution to appear was refused. There was no foundation for it: there was no right against the co-defendant. The admission

in the answer of one defendant was no evidence against the other. Lord Eldon said, that the proper course for obtaining the relief sought by the bill, would be by motion against the defendant Nedriff, upon affidavit. One can understand why the application was made in the manner it was, for in *Hyde v. Foster* the Court appeared to have looked at the answer of a co-defendant. Whether the Court acted on the facts stated in that answer, upon ordering the substituted service, it is impossible to say. But from what Lord Eldon said, I think it is clear, that he thought the motion before him would have been proper, if the facts had been supported by affidavit. Then there is the case of *Waterton v. Croft*, where the original bill was filed, then a cross bill; and the order was made on a motion by the defendant in the cross suit, that the service of subpoena on the clerk in court might be deemed good service. I recollect expressing an opinion, that that was not the proper course, but the course was to stay the proceedings in the original suit, until the plaintiff had answered the bill in the supplemental suit; but that was only a question how far service on the clerk in court should be considered good service. The distinction is plain between being merely clerk in court, and a person having express authority to act in a particular suit; and if I find the cases decided uniformly by four different Judges on that principle, and no case attacking the decision, I think, upon examination of the case, that it is clear that M'Mahon has special authority to act for the assignees of the widow Sheil, and that the order for substitution of service was right. The application to discharge it is therefore wrong, and I shall refuse it with costs.

Jan. 12, 1716.—HALLETT v. SUTTON.—Upon opening the matter, this day, unto the Lord Chancellor, by Mr. Serj. Jekyll, Sir Robert Raymond, Mr. Vernon, and Mr. Williams, being of the plaintiff's counsel, in the presence of Mr. Ward, of counsel with the defendant Brooks, and of Mr. Paucefort, of counsel with Mr. George Sayers, it was alleged, that John Hallett, late father of the plaintiff Mary Hallett, the infant, dying in Barbadoes, the defendants, Edmond Sutton and William Cogan, who live in Barbadoes, have sent over a probate, under the governor's seal of the island, of a will pretended to be made by the said Col. John Hallett, whereof they are executors, and, as such, claim the

residue of the said Col. Hallett's personal estate, after payment of his debts and legacies; and have, likewise, with the said will, sent over a letter of attorney to the defendant Brooks, to procure a probate of the same will from the Prerogative Court of the Archbishop of Canterbury, and the defendant Brooks hath, accordingly, employed Mr. Sayers, a proctor, to take out a commission, directed to the Governor of Barbadoes, in order to prove the said will *per testes*, the witnesses living in that island; which said Mr. Sayers hath summoned the plaintiffs, who had entered a *caveat* against proving the said will, to shew their reasons against the proving thereof; and, upon hearing both sides, the said Prerogative Court hath directed such commission, which hath accordingly been sued forth. That the said defendants, Sutton and Cogan, have already possessed the said Col. Hallett's estate in Barbadoes, and if they be permitted to prove the said pretended will here, the plaintiffs, who are the wife and daughter of the said Col. Hallett, and who are advised to contest the validity of the said will, or at least the title to the personal estate not thereby disposed of, and who, for that purpose, have exhibited their bill in this court, will not be able to compel them to account for the same, by reason that process of contempt cannot be served in the said island. It was, therefore, prayed that service of process of subpoena, for the defendants Sutton and Cogan to appear and answer the plaintiff's bill on the said defendant Brooks, and on the said Mr. Sayer, may be deemed good service on the said defendants Sutton and Cogan. Whereupon, and upon hearing an affidavit of Samuel Clarke read, and what was alleged on both sides, his Lordship doth order that process of subpoena for the said defendants Sutton and Cogan to appear and answer the plaintiff's bill, on the defendant Brooks, and on the said Mr. Sayer the proctor, who hath acted in the Prerogative Court on behalf of the said defendants Sutton and Cogan, be deemed good service of such subpoena on the said defendants Sutton and Cogan.—Reg. Lib. A. 1716, fol. 64.

July 12, 1722.—CARTER v. DE BRUYN.—Upon opening of the matter, this present day, unto the Lord Chancellor, by Mr. Horsley, being of the plaintiff's counsel, in the presence of Mr. Mead, being of counsel for the defendant Vanneck, it was alleged, that the plaintiff exhibited his bill into this court against the defendants, to be relieved touching the matters therein contained; and the defendant De Bruyn lives in Holland, so that the plaintiff cannot serve him with a subpoena, and he employs the defendant Vanneck, as his agent here in England, to act for him, in the matters in the said bill contained. And, therefore, it was prayed, that service of a subpoena to appear and answer the plaintiff's bill on the defendant Vanneck, may be deemed good service of the defendant De Bruyn. Whereupon, and upon hearing of the defendant Vanneck's counsel, and what was alleged on both sides, it is ordered that service of a subpoena on the defendant Vanneck for the defendant De Bruyn, be deemed a good service of the said defendant De Bruyn, to compel him to appear to and answer the plaintiff's bill.—Reg. Lib. A. 1721, fol. 295.

Aug. 5, 1745.—HYDE v. FOSTER.—On opening the matter, this day, unto the Lord Chancellor, Mr. Green being of counsel for the plaintiff, it was alleged, that, in Hilary term 1744, the plaintiff exhibited his bill in this court against the defendants, to be relieved touching the several matters therein complained of; that the defendant Foster was, before the time of filing the bill, and is now, at Jamaica, where he resides. That the defendant Myers has put in his answer to the bill, and thereby sets forth that he is factor, or agent, for the defendant Foster here in England, and that, by virtue of some power or authority from the defendant Foster (who is now at Jamaica), he has for some time past been, and is now, in the possession and receipt of the rents and profits of certain chambers in Barnard's Inn, for the use of the said defendant Foster, which are parts of the premises in question in this cause; and therefore it was prayed that service of subpoena to appear in this cause on the defendant Myers, as agent or factor for the defendant Foster, may be deemed good service of the defendant Foster. Whereupon, and upon hearing of Mr. Brown and Mr. Sewell, of counsel with the defendant, the answer of the defendant Myers was read; and what was alleged by the counsel on both sides: his Lordship doth order that service of a subpoena to appear in the cause on the said defendant Myers, as agent or factor for the defendant Foster, be good service on the said defendant Foster.—Reg. Lib. A. 1744, fol. 491.

GELEDNEKI v. CHARNOCK.—Between Anthony Geledneki and Thomas Malliby plaintiffs, and Robert Charnock, William Lennox, William Thompson, and the Honourable the United Company of Merchants trading to the East Indies, defendants. Upon motion this day, made unto this court by Mr. Stanley, of counsel for the plaintiffs, it was alleged, that it appears, by the affidavit of John Warne, clerk to Messrs. Dann & Teasdale, solicitors for the plaintiffs in this cause, that the defendant Robert Charnock lives and resides in Finsbury Square, in the city of London, and the defendant William Lennox in Broad Street Buildings, in the said city of London; and that the plaintiffs having filed their bill against the said defendant William Thompson, who then and still resides out of the jurisdiction of this Court, as the said deponent believes, the said defendant William Thompson appeared thereto, by Mr. Radcliffe, his clerk in court, and made two several applications by motion of this Court, the notices whereof were signed by Messrs. Crowder & Savil, as his solicitors; and, therefore, it was prayed that process of subpoena so to be awarded against these defendants, Robert Charnock, William Lennox, and William Thompson, to compel them to appear to and answer the plaintiff's bill, may be made returnable immediately; and that service of such subpoena on Messrs. Crowder & Savil, the solicitors, and Mr. Radcliffe, the clerk in court for the defendant William Thompson, may be deemed good service on the said defendant, which, upon hearing the said affidavit read, is ordered accordingly.—Reg. Lib. A. 1800, fol. 426, P.W.

V.C. }
 July 19. } WALTERS v. JACKSON.*

Infant Heir—Decree—Trustee.

In a decree against the infant heir of a devisee whose estate was charged with legacies, the Court will direct a sale, in order to raise the amount necessary to pay the legacies, but will not declare the infant a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of the 1 Will. 4. c. 60.

In this case, a bill was filed by legatees whose legacies were charged on land, of which an infant heir of a devisee under the will, whereby the legacies were given, was seised. The object of the bill was to have the legacies (on a deficiency of personal estate) raised by sale of a competent portion of the land. On the cause coming on for further directions, all the accounts having been taken, and the amount to be raised on the infant's estate having been ascertained,—the sale of a part of the infant's estate being necessary, a question arose as to the form of the decree. For the plaintiffs, it was contended, that it was proper under the 1 Will. 4. c. 60. ss. 6 and 18, (the 1 Will. 4. c. 47. not applying to the case,) that the infant should at once be declared to be a trustee for the legatees, to the extent of the sum to be raised for them, and that a sale and conveyance should be ordered.

Mr. Richards and *Mr. Renshaw*, for the plaintiffs, and—

Mr. Lee, for the infant.

The VICE CHANCELLOR refused then to make any further order, than for a sale of a competent portion of the property, and said, that the direction for sale would be a good ground for the declaration, which might be made on a petition to be presented for a conveyance after the sale should have taken place. His Honour mentioned a MS. case in his own books, in which, in similar circumstances, he had, in 1836, made the like order.

* Ex relatione.

V.C. }
 July 31. } DAWSON v. WHALLEY.

Injunction — Creditor — Payment into Court by Executor.

Whether an executor, upon obtaining an injunction to restrain a creditor from suing at law, is bound to pay into court the amount of assets in his hands—quære.

A decree for administration had been taken in the usual form; in a suit instituted by the executor. A motion was now made to restrain a creditor from proceeding at law.

Mr. K. Bruce, for the motion.

Mr. Lee, for the creditor whose action it was sought to restrain, insisted, that it was necessary for the executor to make affidavit of the amount of assets in his hands, and to pay the same into court, before the injunction could issue.

Paxton v. Douglas, 8 Ves. 520.

Terwest v. Featherby, 2 Mer. 480.

The motion stood over.

July 31.—*Mr. K. Bruce* said, that inquiry had been made of the registrars, and that it appeared, that notwithstanding the observations in the cases cited, the practice had not been to pay the balance of assets into court.

Mr. Lee, contra.—The authorities shew that the payment into court is necessary; and it is plain that, otherwise, the creditor is deprived of his legal remedy, and has no protection against a subsequent fraudulent dissipation of the assets.

The VICE CHANCELLOR.—If the practice has been different from what might be inferred from the reported cases, we must, nevertheless, proceed according to the practice.

[An order was ultimately taken by consent, by which the executor was directed to pay into court a sufficient sum to cover the amount of the debt which was the subject of the action, and which sum was to be specially appropriated to answer that debt, and thereupon the injunction was to issue.]

L.C. }
 Jan. 30; } MARTIN v. WHICHELO.
 Aug. 3. }

Practice.—Evidence—Mistake—Laches—Creditors' Suit.

Where a creditors' bill was filed by A. in 1836, for obtaining payment out of the real estate of a deceased debtor, of a debt due on a promissory note given in the year 1826, and in respect of which, judgment had been obtained by A. against B, the debtor's executor, in 1833, the debtor having died in 1830, and having refused payment of the promissory note in 1829—on an application by A, at the hearing of the cause, for leave to exhibit interrogatories to prove A's debt, against the devisees of the debtor's real estates, (A. having only proved the judgment debt obtained in the action against the executor,) the Court refused to grant the same, and dismissed the bill as against the devisees of the debtor's real estates.

Semble—that such dismissal would be without prejudice to A's filing another bill against the devisees.

Diones Geere was, in 1826, indebted to the plaintiff on a promissory note, in the sum of 746*l.* 11*s.* 4*d.*, and in 1829, the note was presented for payment, and dishonoured. In December 1830, Diones Geere died, having made his will, whereby, after directing his debts, &c. to be paid, and giving divers pecuniary legacies, he gave certain freehold and copyhold and leasehold property to William Geere, and other freehold property to R. L. Gregory, and his residuary property he gave to R. L. Whichelo.

R. L. Whichelo proved the will, and permitted W. Geere and R. L. Gregory respectively to take possession of the property devised to them, and Whichelo, as was stated by the bill, possessed himself of the residue of the testator's real and personal estate, the personal estate being sworn by him, as sole acting executor, to be under 6,000*l.*

In June 1832, the plaintiff Martin commenced an action against Whichelo, on the promissory note, and in March 1833 recovered a verdict for 998*l.* 4*s.* 11*d.*, (being the amount of debt, interest, and costs,) and final judgment was signed for 1,052*l.*

The defendants to the bill, were R. L. Whichelo, (against whom the bill, on proof of an exemplified copy of the judgment obtained against him, was taken *pro confesso*,) the personal representative of William Geere and R. L. Gregory: and the bill stated, amongst other things, that in the action brought against Whichelo, he did not plead *plene administravit*, but, on the contrary, admitted assets, and that since the signing of final judgment in the action, Whichelo, to the plaintiff's knowledge, had had assets in his hands to the amount of 3,460*l.* The plaintiff took no further proceedings until July 1836, when she filed the present bill on behalf of herself and all others the creditors of Diones Geere, deceased, by which, the usual relief was prayed for payment of the testator's debts, and, if necessary, that the assets of the said testator might be marshalled.

The cause having now come on for hearing, before his Lordship, and there being no other proof of the plaintiff's debt than the exemplified copy of the judgment obtained by her in the action brought against Whichelo,—

Mr. Turner applied on behalf of the plaintiff, that the cause might stand over, to enable her to give evidence of her debt against the devisees of the testator's real estate, and cited—

Seton on Decrees, 363.

Lechmere v. Brasier, 2 Jac. & Walk.

287; s. c. 4 Law J. Rep. Chanc. 95.

Hood v. Pimm, 4 Sim. 101; s. c. 9 Law J. Rep. Chanc. 63.

Mitford on Pleading, 329, 4th edit.

Moons v. De Bernales, 1 Russ. 301.

Braithwaite v. Rippon, a partnership case *coram* L.C., MS. not yet reported—

as authorities for the application, and contended, that in the case before the Court, no inconvenience could arise to any party, in granting the application; nor could there be any inducement to a witness to commit perjury; that the omission was a mere slip, and in *Hood v. Pimm*, interrogatories were allowed by the Court to be exhibited, to prove a will after decree, and in *Moons v. De Bernales*, the Court gave permission to exhibit interrogatories, to prove a promissory note the main support of the suit; that in the present case, the demand against the real estate did not

arise, until it became evident there was no personal estate left to answer the same.

Mr. Wakefield, Mr. Bethell, and Mr. Rogers, for the defendants Geere and Gregory respectively, opposed the application. — In all the cases cited, except *Cox v. Allingham* (1), the application was made before the hearing of the cause. In *Hood v. Pimm*, it was proved, that the absence of proof arose from a mere slip. In the present case, the proof sought to be made, was the main object of the suit, and much danger would attend the granting the application; and the Statute of Limitations was an answer to the application, if the dates of the different proceedings were examined—*Putnam v. Bates* (2).

At the close of the arguments, his Lordship said, he would look at the cases cited, before he disposed of the application, and that if he found it right to dismiss the bill against the devisees, he should do so, without prejudice to the plaintiff's filing a new bill against them.

THE LORD CHANCELLOR.—[After shortly stating the facts, his Lordship proceeded as follows:]—Whichelo, in the action brought against him by the plaintiff, did not plead *plene administravit*, and the plaintiff became entitled to sue out execution against Whichelo, and after a lapse of ten years from the date of the promissory note, the plaintiff filed her bill against the devisees of the debtor's real estates. The plaintiff took the bill *pro confesso* against Whichelo, and as against the defendants, the devisees, no proof has been adduced of the plaintiff's debt, other than an exemplified copy of the judgment obtained in the action against Whichelo. The plaintiff now seeks of the Court, liberty to enter into proof of the debt against the devisees. It is impossible to reconcile the reported cases that relate to the point, the subject of discussion before me—vide *Seton on Decrees*, 363, 2 *Daniel's Prac.* 416; the Court, however, has clearly exercised a wide discretion in cases of this nature; and in my opinion, the merits of each case ought to have weight, in the consideration of an application like the present,

which does not appear to me to be one in which I ought to grant to the plaintiff the indulgence he seeks; and therefore, as against the devisees, the bill must be dismissed.

V.C.
Jan. 18, 19, 20, }
22, & 23; } **BANNATYNE v. LEADER.**
June 24.

*Bankrupt — Order and Disposition —
Fraudulent Preference—Act of Bankruptcy.*

A trader, being indebted to the estate of a testator, in May 1831, assigned to the residuary legatee of that testator a share in a manufacturing concern, in consideration of which a sum of money was paid to the trader, and the securities for his debt were given up. The manufacturing business was carried on in the name of the trader, until the 2nd of January 1832. On the 26th of January, a fiat in bankruptcy was issued against the trader, on a debt prior to the assignment:—Held, under the circumstances, that the share in the manufacturing concern was not in the order and disposition of the bankrupt.

Assignment by the same trader, of his house and furniture, in July 1831, to the trustees of his son's marriage settlement, as a further security for the payment of a sum of money secured to them upon the bond of the trader, held, not an act of bankruptcy.

The facts of the case, as they appeared upon the evidence which was received, are minutely stated in the judgment of the Vice Chancellor.

Mr. Jacob, Mr. Richards, and Mr. Russell, for the plaintiffs.

Mr. K. Bruce, Sir W. W. Follett, Mr. Wigram, Mr. Reynolds, and Mr. Walford, for the several defendants.

June 24.—**THE VICE CHANCELLOR.**—In this case, a bill has been filed by the assignees of John Maberly, a bankrupt, against John Temple Leader, and other parties, under the following circumstances. Before and in 1825, John Maberly carried on linen manufactories, at Aberdeen and Montrose, with branch establishments at Edinburgh, Glasgow, and Dundee, and in Bread Street, London, under the firm of "Ma-

(1) Jac. 337.

(2) 3 Russ. 188.

berly & Co." At the same time, he carried on a banking business at Aberdeen and Montrose, with branches at Edinburgh, Glasgow and Dundee, and in Bread Street, under the firm of "John Maberly." He carried on the banking business till January 1832, when he became bankrupt.

On the 12th of March 1825, articles of agreement were made between John Maberly and John Baker Richards, whereby Richards, in consideration of 100,000*l.*, was admitted a partner for a moiety in the linen business. The partnership was to continue for twenty-one years; and it was agreed, that deeds should be executed containing a provision for vesting the tenements, in which the business was carried on, with the fixtures, float engines, and machinery, for the benefit of the partners, according to their interests in the partnership. Nothing was mentioned in the articles about the name of the partnership firm, and in fact the business was carried on under the name of Maberly & Co.

In 1829, certain hereditible and moveable properties in Scotland, constituting all or the greatest part of the property in the manufactories, were vested by Scotch conveyances in J. W. Freshfield, and R. Langford, as trustees for Maberly and Richards; and in the same year a lease of a house, No. 47, Bread Street, for thirty-four years and upwards, in which the London establishments of the linen manufactories and banking business were carried on, was made to Maberly and Richards. A part of the house used by Maberly for his banking business, was let by the partnership to him. On the 19th of December 1825, an indenture of that date was made between John Maberly of the first, R. Langford of the second, and William Leader, the father of the defendant, John Temple Leader, of the third part, which recited, that on the 12th inst., Langford advanced 10,000*l.* to Maberly, and on the 19th Langford transferred into Maberly's name 17,800*l.* consols, and 15,000*l.* reduced stock, and Leader transferred into Maberly's name 25,000*l.*, 3*l.* 10*s.* per cents., and 1,400*l.*, 4*l.* per cents., and thereby Maberly covenanted to pay and transfer to Langford and Leader respectively, the money and bank annuities so lent, and by way of security to mortgage all his lands in Ad-

dington and Croydon, (except the Spring Park estate,) his leasehold tenements in Mary-le-bone, his share in the linen business of Maberly & Co., and certain policies of assurance, and other personal estate.

Leader afterwards lent to Maberly two other sums, one of 12,000*l.* secured by an equitable mortgage of Maberly's leasehold house in Regent's Park, and a deposit of the lease; and another of 25,000*l.* secured by bills of exchange.

On the 14th of January 1828, William Leader died, having by his will appointed John Masterman, Col. W. L. Maberly, the son of John Maberly, E. T. Booth, and R. Langford, his executors, and made his son, the defendant John Temple Leader, his residuary legatee, who thereby became entitled to the debts due to his father's estate from Maberly. In 1830, R. Langford died. On the 7th of May 1831, John Temple Leader attained the age of twenty-one years. He had not been brought up for mercantile business, but had been educated at Oxford, as a gentleman commoner at Christ Church, and during the long vacations made tours in France, Norway, and Ireland, for pleasure and improvement. On the 9th of May 1831, John Maberly, J. B. Richards, and John Temple Leader, signed the memorandum of the 9th of May, set forth in the bill, by which the partnership between Maberly and Richards was dissolved, and in consideration of 104,000*l.* Maberly's share was to be given up to Mr. Leader. Maberly was no longer to use the name of the firm, but Messrs. Richards and Leader consented that the name of the firm should not be changed, nor the retirement of Mr. Maberly published in the *Gazette*, till the 31st of December then next. This arrangement was made with the concurrence of Mr. Leader's surviving executors. The debts due from Maberly to Leader's estate were considered to be satisfied, the bills of exchange for 25,000*l.* were given up, and the sum of 28,500*l.* was paid by or on behalf of John Temple Leader to Maberly, who signed a receipt, dated the 9th of May 1831. The arrangement was made at a meeting of John Temple Leader, J. Masterman, J. Maberly, J. B. Richards, Mr. Freshfield, jun., Mr. Lancelot Holland, and Mr. Booth. The bill charges, that before January 1832, Mr.

Freshfield, the surviving trustee of the Scotch property, had no notice of the dissolution of the partnership between Maberly and Richards. That, however, is expressly disproved by Freshfield, in his answer to the 36th interrogatory, who states that the exhibit *L.* was given to him as surviving trustee and solicitor for Mr. Richards, on the 10th of May 1831. Mr. Freshfield, jun., in his answer to the 9th interrogatory, says, he delivered it to his father on the 9th of May. The effect of this arrangement was to leave the leasehold house in the Regent's Park unincumbered, and at the disposal of Mr. Maberly. The arrangement was made for full valuable consideration, deliberately and fairly. It had been proposed and discussed in the lifetime of W. Leader, and was matured by his executors, and there is nothing to impeach it. The arrangement, which at first rested in agreement, has been perfected by formal conveyances; and Mr. Leader and the parties claiming under Mr. Richards, during the years 1835, 1836, 1837, and 1838, expended nearly 90,000*l.* in various improvements upon the works in Scotland, as Edwards, who was examined in February 1839, proves. In the month of June 1828, Mr. Maberly was indebted to his son Colonel Maberly, in the sum of 12,300*l.*, for which he gave the Colonel a common money bond, dated the 28th of June 1828, payable in twelve months. In November 1830, Col. Maberly married Miss Prittie, and a settlement was made on the marriage, by indenture dated the 12th of November 1830, by which the bond was assigned to G. R. Smith and G. P. Prittie, upon certain trusts declared by that indenture. By an indenture dated the 1st of July 1831, made between John Maberly, of the one part, and Smith of the other part, reciting a lease for a term of years of the house in Regent's Park, an assignment of it to Maberly, the bond, and the marriage settlement, and that Prittie and Smith had applied to Maberly for payment of the 12,300*l.*, but it not being convenient to him to comply with their request, he had agreed, as a further security, to assign the house, with the fixtures, goods, and furniture, mentioned in the schedule; Maberly assigned the house for the residue of the term, with the furniture, fixtures, and

things in, about, and belonging to the house, which were mentioned in the schedule, to Prittie and Smith, upon trust to sell and satisfy the bond, and pay the surplus of the proceeds (if any) to Maberly; and until sale, to receive the rents and apply them in payment, first, of the interest, and next of the principal due on the bond. This indenture was executed by Maberly on the 1st of July 1831.

After the 9th of May 1831, Maberly carried on his business of a banker in London, until the 2nd of January 1832, when he stopped payment there, and in Scotland, till a few days after, when he stopped payment there also.

On the 3rd of January the first public announcement of the dissolution of his partnership with Richards was made by inserting in the *London Gazette* of that day an advertisement of the 9th of May 1831; and circulars, dated the 2nd of January 1832, were sent to the Scotch correspondents, informing them of the dissolution, and that the business of linen manufacturers would be carried on by Richards and John Temple Leader, under the firm of Richards & Co.

On the 22nd of January 1832, a fiat in bankruptcy was issued against Maberly upon the petition of Peters, on a debt contracted before the end of 1830. Under that fiat Maberly was adjudged and declared a bankrupt, and the plaintiffs were appointed his assignees. The plaintiffs have filed their bill against Mr. Leader, and against other parties entitled under Mr. Richards, who is dead, claiming in effect to be entitled to that moiety of the partnership which was given up by Mr. Maberly to Mr. Leader, and to have accounts taken of the profits, and payment made to them; and they allege they are entitled to relief on this ground:—that the execution of the indenture of the 1st of July 1831, was an act of bankruptcy, and that, up to the 3rd of January 1832, Maberly, by consent of Mr. Leader, was the reputed owner, and had the possession, order, and disposition of the share taken by Mr. Leader, under the agreement of the 9th of May 1831. These propositions are stated several times in the bill, and were contended for by the plaintiffs' counsel in argument at the bar. If either of them

fails, the plaintiffs are not entitled to the relief they seek.

It is said, that the execution of the indenture of the 1st of July 1831, was an act of bankruptcy, because it was a fraudulent grant or conveyance of Maberly's lands, tenements, goods, or chattels, within the meaning of the 2nd section of the 6 Geol. 4. c. 16; the words of the act being, "that if any such trader shall make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader making or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." Now it so happens that this section has received a construction in a court of law, which I see no ground for disputing. I refer to the case of *Belcher v. Prittie* (1). There the present plaintiffs brought trover for the title-deeds of the house in the Regent's Park, against Mr. Prittie and Mr. Smith. Most of the facts in that case were the same as the facts in this case; all were not precisely the same, and, therefore, the decision of that case is not a decision of this case. But the law laid down in that case is the law which must be applicable to the present case—namely, that in order to make the assignment of the 1st of July 1831 an act of bankruptcy, it must be shewn that it was executed by Maberly in contemplation of bankruptcy, and was executed by him spontaneously, and not as yielding to the solicitation and request of the party who had a right to demand it of him. The plaintiffs expressly charge, that the assignment of the 1st of July 1831, was fraudulent, and made for the purpose of giving Col. Maberly's trustees an undue and unlawful preference over Maberly's other creditors; and that a letter of the 13th of June 1831, from Maberly to his solicitor, Mr. Walford, which was in evidence on the action, and has been proved in this cause, was written, and directions for the assignment were

given by Maberly voluntarily, and of his own accord, and without any previous demand being made. Now Mr. Maberly has been examined in this cause, and says, in his answer to the 4th interrogatory, "I did not make such assignment spontaneously. Col. Maberly called upon me, in my house, when I was ill; he stated that he had heard from Mr. Masterman that I had sold my interest in the linen concern, and that various securities, and a sum of money, had been transferred and paid to me; and, therefore, he particularly requested that I would assign over the Regent's Park premises, which he knew I had, to his wife's trustees, and he wished the bond to be discharged; and he added, 'you have so many things to do, you will forget it;' and he said, 'let me beg of you to go immediately to Walford, for the purpose of giving him directions to prepare the assignment.' I promised I would, as soon as I could go out; and I did, accordingly, give Mr. Walford instructions to prepare the assignment." And so he did, by sending to Walford the letter of the 13th of June 1831. This evidence of Maberly is confirmed by the answer of Col. Maberly to the 12th interrogatory, who says:—"The evening before I mentioned the subject to my father, a conversation took place between the said G. R. Smith (one of the trustees of the Colonel's settlement) and myself, as to the propriety of my father giving some further security for the sum of 12,300*l.*, secured by the bond, in consequence of his property having been released from William Leader's claims upon it; and it was agreed that I should have an interview with my father the following morning, and propose to him to give us a security upon his house and furniture in the Regent's Park, as we considered they were worth somewhere about the sum secured by the bond. I accordingly saw my father, the next day, at his house, when he was confined to his bed with the gout; and then I made the said proposition to him. He at first hesitated to comply with it; but, upon my pressing it, and stating that I was anxious for it to be done, as the money secured by the bond constituted the settlement which I had made upon my wife, he acceded to the application, and, at my request, promised to give Messrs. Walford directions to

(1) 10 Bing. 408; s. c. 3 Law J. Rep. (N.S.) C.P. 85.

prepare the requisite instrument." This is also confirmed by Mr. G. R. Smith, in his answer to the 12th interrogatory. After stating that he and Col. Maberly agreed that the Colonel should make the application to his father, and that the Colonel reported that he had made it, he says:—"I repeated the application to John Maberly afterwards; we were then both members of the House of Commons, and we were almost in the daily habit of meeting, and he confirmed the consent which he had expressed to his son." And Mr. T. Walford, in his answer to the 13th interrogatory, distinctly proves that, in consequence of the note of the 13th of June, he waited upon Maberly, and afterwards prepared the assignment of the 1st of July, 1831. From this evidence, which is not contradicted, it appears that the assignment was not voluntarily made. The son, with the concurrence of one of his trustees, applied to the father when he was ill, pressed him to make the assignment, and the trustee repeated the application. This was moral pressure, having regard to the relations in which the parties stood to each other. The assignment was not made hastily, but deliberately. Mr. Walford says:—"I have no doubt but that he must have seen the said John Maberly several times (on cross-examination he says two or three times,) between the times of my first receiving instructions to prepare the said assignment, and his execution of it, as the deed was not executed by him till the 1st of July 1831." Maberly, in his answer to the 4th interrogatory, says:—"I did not, at the time of executing the said indenture (meaning the assignment), contemplate bankruptcy, nor did I execute the same with intent to defeat or delay any of my creditors in obtaining payment of the debts then owing by me to them." William Masterman and Mr. Freshfield, jun., in answer to the 21st interrogatory, proved that Maberly was in very good pecuniary credit in the months of May, June, and July, 1831. The plaintiffs allege and insist, that, when Maberly executed the indenture of the 1st of July 1831, he was in embarrassed circumstances, and would have inferred that Maberly, because he was embarrassed, contemplated bankruptcy. In order to make out the embarrassment, the plaintiffs have proved

the refusal to pay the two bills drawn by De Silva, the withdrawing from Masterman, and placing in Oxley's hands, the monies mentioned in the plaintiffs' exhibits 13 and 14; the balance sheets, exhibit 17; the failure of the Terceira Loan; and especially the loss incurred by the speculation in the French funds. De Silva's bills were presented for payment on the 11th of July, when special reasons were given in answer, which appear on the exhibits 41 and 42. From what Mr. Freshfield, jun., says, in answer to the 30th interrogatory, it appears there were special reasons for not paying the bills; and that, in order to prevent foreign attachment by the bill-holders, the expedient was adopted, on the 11th or 13th of July, 1831, of transferring Maberly's money from Masterman's to Oxley's; and the dispute terminated in negotiations. All this might have been fairly done by an unembarrassed man, and certainly does not prove either contemplation of bankruptcy, or embarrassment. The balance sheets shew the deficiency to have been less on the 30th of June, 1831, than it was on the 30th of April, or on the 1st of January. As to the Terceira loan, nothing is said about it in the amended bill; but, from a passage in Mr. Leader's answer, it seems that something was said about it in the original bill. Both plaintiffs and defendants, however, have entered into evidence respecting it; and from Easthope's evidence it appears, that, on the 9th of June 1831, it had, in Maberly's judgment, entirely failed. But though it failed as a source of profit, there is no proof that Maberly lost by it. As to the speculation in the French funds, it appears, from the Marquis de Lavalette's evidence, that Maberly arrived in Paris in May 1831, and was, in June, introduced by the Marquis to Franchessin. According to Weyer's evidence, and the contracts A and B, the purchases of French Rentes by Franchessin, for Maberly, were made on the 3rd and 4th of June. On the 6th or 7th of June, Maberly returned to London. On the 10th of June there was a continuation, which was before Franchessin could have received Maberly's letter of the 11th, which letter directed that no steps should be taken as to continuation, until Maberly directed what he thought best. The continuation made by Franchessin

seems to have been without Maberly's authority. Maberly states that he believes it was so. Maberly then wrote the letter of the 23rd of June, in pursuance of which Franchessin sold the Rentes on the 25th, at a loss of nearly 18,000*l.* Before the 29th of June, Maberly paid, on account of the loss, one sum of 5,000*l.*, and another of 4,000*l.*, and on the 29th of June he gave a bond to Franchessin and the Count de Iabal for 8,838*l.*, to be paid in eighteen months, by equal monthly instalments; and on the 26th of July 1831, he paid the first instalment. Applications were afterwards made, by Lavalette, to Maberly, for payment of instalments over-due, but without success. Maberly thought Franchessin had acted wrongly. What happened after the 1st of July is of little importance. Taking the evidence in the strongest way, the utmost that it can amount to is, that Maberly felt a difficulty in paying 8,838*l.* on the 29th of June. But so little ground is there for inferring, from that circumstance, that Maberly then contemplated bankruptcy; that Lavalette says, that, on his second journey, on the 27th of June, to London, he found Maberly very busily engaged on the subject of a Belgian loan, the treaty for which, according to Mr. Freshfield, jun.'s evidence, was going on in November 1831. When the time for advertising the dissolution arrived, Maberly struggled to have it postponed. He was anxious to go on as he had done. I think it is plain, upon all the evidence together, that Maberly did not, in the year 1831, contemplate bankruptcy, but meant to carry on his numerous affairs—and, in fact, did carry them on—as he had formerly done, until the beginning of 1832, excepting only the linen business; and, more especially, that he did not contemplate bankruptcy on the 1st of July 1831.

As to order and disposition under the 72nd section of 6 Geo. 4. c. 16, it is clear, upon the evidence, that the clause in the memorandum of the 9th May 1831, postponing the dissolution of Maberly's partnership with Richards, was introduced with reference to his connexion with the borough of Abingdon, for which place, as Mr. Graham proves, he had been chosen member in April 1831, and which he was desirous to represent again, and which, for that

purpose, he visited in September 1831; of itself strong evidence that he did not then contemplate bankruptcy. Though, in fact, the linen business was carried on under the firm of Maberly & Co., till the 2nd of January 1832, in pursuance of that clause, it is proved that, after the 9th of May 1831, Maberly did not interfere in the linen business, and did not give any order or direction in the management of it: the business was carried on under the superintendence of Mr. Richards. George Edwards, on cross-examination for the plaintiffs, proves that, after the middle of 1831, the practice of sending a weekly statement of the business to Maberly was discontinued. The reason assigned was, that Maberly took no interest in it, and did not wish to see it. Edwards does not believe that Maberly ever came to the counting-house of the linen establishment after the 9th of May 1831. Upon the face of the transaction, it was very unlikely that Maberly would interfere. If he had attempted to do so, he would at once have been stopped by Mr. Richards, who was upon the spot, though Mr. Leader was absent. With respect to the property vested in Mr. Freshfield, Maberly could make no disposition without Freshfield's co-operation; and Freshfield had notice of the transaction of the 9th of May. Therefore, with all due deference to what Mr. Anderson has stated to be Scotch law, I do not see what order and disposition Maberly had of the share sold to Mr. Leader. The utmost that it would have amounted to was this—that, according to the present state of the law of this court, he might have received some debts from debtors to the firm of Maberly & Co., who had no notice of the dissolution. But if there were no act of bankruptcy on the 1st of July 1831, the consideration of this point is unnecessary.

It has been said, however, that at all events there ought to be an inquiry on an issue, especially because the facts relating to the dealings with Franchessin were not before the jury in the action of trover, but have been lately discovered. The action was commenced in Trinity term, 1832, and judgment for the defendants was signed on the 1st of February 1834. The charge in the bill is, that in or about May 1837, Franchessin, for the first time, tried to prove under the fiat, and the plaintiffs had

not, nor had either of them, previously to Franchessin's applying to prove, any knowledge or notice of the speculations in the French funds. Mr. Gordon says, Franchessin first applied to prove on or about the 17th of March 1837, and, in his answer to the 78th interrogatory, says, with his characteristic regard to accuracy; that, previously to the application by Franchessin to prove, the plaintiffs had not obtained any accurate knowledge or notice of Maberly's speculations in the French funds. This falls very far short of the charge in the bill; and what was the real truth? Maberly, to the 8th interrogatory, says:—"I left England in the early part of the year 1832, and, I believe, before the month of April in that year. The plaintiff, Alexander B. Belcher, asked me if there was not a large debt due to some French persons for stock transactions. I said, 'Yes, there was;' and he replied, he had so heard. I did not mention it to the other plaintiffs, or either of them, because I did not consider it a legal debt: and I did not mention it to Belcher till he asked me the question, for the same reason. The payment of the 9,000*l.* appears in my banker's book, and the same sum also appears in my account, relating to stock transactions, which book and account were delivered up by me, and are now, as I believe, in the possession of Belcher, as the official assignee." The plaintiffs, therefore, (for the knowledge of *us* is the knowledge of *all*), in April 1832, had some knowledge of these French speculations, which might have been matured into full information by examining Maberly, then in England. They chose, however, to bring the action of trover. That failed: and then, on the 6th of December 1837, they filed their present bill. On the trial of the action, Maberly and his confidential clerk, E. Y. Bartley, a material witness, as Mr. Gregson proves, were examined. Since then they have both died. The laches of the plaintiffs has made it impossible to have any further inquiry, or an issue tried in a fair manner; and, upon the whole of the case, my deliberate judgment is, that the bill should be dismissed, with costs.

Bill dismissed accordingly.

M.R.
Dec. 8, 16, 1840. } WITHY v. MANGLES.
July 28, 1841. }

Will — Next-of-kin — Survivorship — Settlement — Construction.

*By settlement on the marriage of H. W. with E. M., it was provided, that within six months after the death of J. M., the father of E. M., his executors should pay to the trustees of the settlement 10,000*l.*, to be invested, the interest to be paid to E. M. for her life, with remainder to H. W. for his life, remainder to the children of the marriage, as the parents or survivor should appoint, and, in default of appointment, for the only child of the marriage, if but one, but if more than one, in equal shares, the same to be vested interests in sons at twenty-one, and in daughters at twenty-one or marriage; and if no such child should attain a vested interest, then the 10,000*l.* to go amongst the brothers and sisters of E. M., as she might appoint, and, in default of appointment, the same to be held in trust for such person or persons as, at the time of the death of E. M., should be her next-of-kin.*

*The marriage was solemnized, and there was issue only one child, who survived its mother only a few days, and died an infant, and the parents of E. M. survived the child: — Held, that the child and the parents of E. M., by virtue of the limitation to the next-of-kin of E. M., took the 10,000*l.* as joint tenants; and that the parents of E. M., on surviving the child, were entitled to the whole 10,000*l.* as the survivors.*

The plaintiff in this cause claimed to be entitled to the sum of 10,000*l.*, comprised in the settlement made on the marriage of Henry Withy and Emily Mangles. By the settlement, dated the 23rd of August 1825, it was, amongst other things, provided, that within six months after the death of Robert Withy, the father of the intended husband, his executors should pay to the trustees of the settlement the principal sum of 5,000*l.*; and that within six months after the death of James Mangles, the father of the intended wife, his executors should pay to the trustees of the settlement the principal sum of 10,000*l.*; and the trustees were to invest the two sums, and pay the interest of the 5,000*l.* to Henry

Withy for his life, with remainder to Emily Mangles for her life, and the interest of the 10,000*l.* to Emily Mangles for her life, with remainder to Henry Withy for life; and after the death of the survivor, the trustees were to hold both sums in trust for the children of the marriage, in such manner as the parents or the survivor of them should by deed or will appoint, and, in default of appointment, for the only child of the marriage, if there should be but one, and, if more than one, in equal shares; but the share or shares to be considered interests vested in a son or sons at twenty-one, or in a daughter or daughters at twenty-one or marriage. And in case there should be no son living to attain twenty-one, and no daughter to attain twenty-one or be married, the trustees were to stand possessed of the two sums of 5,000*l.* and 10,000*l.*, on the trusts following; that is to say, as to the sum of 5,000*l.*, on trust for the executors, administrators, and assigns of Robert Withy, the father of Henry Withy; and the sum of 10,000*l.* on trust for such person or persons as, at the time of the death of Emily Mangles, should be her next-of-kin.

The marriage was duly solemnized, and there was issue of the marriage only one child, viz. Emilius Henry Withy. The wife died, leaving that child surviving her; and in the course of a few days afterwards the child died, being an infant of tender age. Under these circumstances, the limitation of the two sums of 5,000*l.* and 10,000*l.*, in default of any child living to acquire a vested interest, took effect, no execution having been made of the power of appointment created by the settlement as to the 10,000*l.*; and the question in this cause was, to whom the sum of 10,000*l.*, limited to such person or persons as at the time of the death of Emily Mangles should be her next-of-kin, belonged. At the time of her death, her father, her mother, and her only child, were living. The father of Emily Mangles died, leaving the defendant, Mary Mangles, the mother of Emily Mangles, his widow, and the other defendants his legal personal representatives. The plaintiff represented the child, and insisted, that the child was sole next-of-kin; that she was entitled to the 10,000*l.*, by virtue of the limitation to the next-of-kin of Emily

Mangles at the time of her death. The defendants insisted, in the first place, that by the intention of the settlement, the child was excluded; and that if the child was not excluded, on the proper construction of the settlement, the father and mother of Emily Mangles and her child were equally near of kin, and took as joint tenants; and that the representatives of the child who died first was not entitled to any part of the 10,000*l.*

Mr. Tinney, Mr. Pemberton, and Mr. Geldart, for the plaintiff, contended, that the child of Mrs. Withy took the fund under the limitation to her next-of-kin, the right thereto being determined by the common law, the statute 21 Hen. 8. c. 5. s. 3. directing, that letters of administration shall be granted to the widow or children: that the next-of-kin had a right to claim administration as children in preference to the parents of a deceased person; and if there were father and mother, the father was entitled, to the exclusion of the mother (1): that the descending line was always preferred; and as long as there was a descendant, no ascendant could claim administration (2): that if the father died without obtaining personal representation, there was no authority for saying that the right of representation would go to the mother, as the father and mother did not take jointly: that the *jus potius* ought to prevail in this case, especially where Henry Withy took an interest for life under the settlement.

The other cases cited on behalf of the plaintiff were—

Crooke v. Watt, 2 Vern. 124.

The King v. Ward, 2 Stra. 893.

Evelyn v. Evelyn, Ambl. 191.

In re the goods of Gill, 1 Hag. 342.

Pearce v. Vincent, 2 Myl. & K. 800; s. c.

2 Law J. Rep. (n.s.) Chanc. 187.

Elmsley v. Young, *ibid.* 82, 780; s. c.

4 Law J. Rep. (n.s.) Chanc. 200.

Blackborough v. Davis, 1 P. Wms. 41.

Powell on Devises, by Jarman, vol. 2. p. 259.

Mr. Kindersley, Mr. Humphrey, and Mr. Lovat, for the defendants, contended,

(1) 2 Black. 504.

(2) Stat. 31 Ed. 3. c. 11; 4 Burn's Ec. Law, 413; Burge's Com. vol. 4. pp. 31, 37.

that taking the whole scope and subject of the settlement together, it was contrary to the intention of the parties to it that the child should be considered as the proper party to take the 10,000*l.*; for, by the settlement, in default of appointment by the parents, or the survivor of them, the children took no interest until they attained twenty-one or married: that in the cases cited on behalf of the plaintiff, the parties did not take contingent interests: that the other side had confounded three things—viz. first, the rules of the ecclesiastical courts as to consanguinity; secondly, the right to have administration granted by those courts; and thirdly, the right to beneficial succession, for the purposes of enjoyment: that the law of consanguinity was one of nature, there being one degree from the father to the son, and two degrees from the grandfather to the grandson: that the civil authority of any country might declare and enact, that such and such persons are of the same kin, and that such an one should have administration granted to him in preference to others; but such enactments were unconnected with the law of consanguinity: that the law did not say the descending line was nearer of kin than the ascending line, but that the descending line should be preferred: that as regarded personal estate, the law of the country was artificial, and the beneficial succession was regulated by statutes (3): that the real point established in *Elmsley v. Young* was, that where you find the words “next-of-kin” in a deed, the meaning was, the natural character, and not the civil or artificial character of next-of-kin, as declared by the law of England: that that point had been previously settled in *Brandon v. Brandon* (4): that if this case were to be decided by the law of propinquity, and not of representation, then Mr. and Mrs. Mangles were as near of kin as the child; and as, in that case, the three would take as joint tenants, the former, who had survived the latter, would take the whole fund.

The following were the other authorities cited on the part of the defendants—

Co. Litt. p. 10, b, sec. 2.

Curtis v. Price, 12 Ves. 89.

(3) *Just. Inst.* b. 3. tit. 6. p. 28.

(4) 3 *Swanst.* 312.

NEW SERIES, X.—CHANC.

Bulmer v. Jay, 4 Sim. 48; s. c. 3 Myl. & K. 197.

Woodcock v. the Duke of Dorset, 3 Bro. C.C. 569.

Bird v. Wood, 2 Sim. & Stu. 400; s. c. 4 Law J. Rep. Chanc. 86.

Carter v. Cramley, Sir T. Raym. 496.

Collingwood v. Pace, 1 Vent. 414.

Counden v. Clark, Hobart's Rep. 32.

Jones v. Colbeck, 8 Ves. 38.

THE MASTER OF THE ROLLS.—[After stating the facts, his Lordship expressed himself as follows:—]On the best consideration which I have been able to give to the settlement, I cannot collect from it an intention to exclude the child. The particular event which occurred is not contemplated; and as to the sum of 10,000*l.*, no provision is made otherwise than by the limitation to the next-of-kin of Mrs. Withy. Whether a child should be the next-of-kin, or one of the next-of-kin, does not appear to me to have been thought of; and there being no expressed intention, as far as I can discover, and no constructive intention, either to include or exclude the child, I find myself under the necessity of inquiring who, under the circumstances, ought to be deemed to be next-of-kin of Mrs. Withy at the time of her death.

The plaintiff alleges, that according to the meaning of the expression “next-of-kin,” which is adopted by the law of England, the child of any proposed person is to be considered as “next-of-kin,” in exclusion of his father and mother. The defendants admit, that by the law of England, the child of any intestate deceased person is entitled to administration of the effects of such person, in preference to his father or mother, and is also entitled to the succession of the intestate's estate, in preference to his father or mother; but they say, that this preference does not confound the nature of things, and make the child nearer of kin to his parent than the parent is to his child.

The right to administer an intestate's estate, and the right of succession to it, are the result of civil and municipal law, and may be arbitrarily determined, in such manner as may best promote the public interests; but the defendants allege, that

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nearness of kin, or propinquity in degree of consanguinity, is a fact in nature, and admits of no regulation or qualification; and they therefore found the claim of the defendants upon this, that the persons who fall properly under the description of next-of-kin must be persons standing in equal degree of propinquity; and that the father and mother must necessarily be deemed as near of kin to their daughter, as the child of the daughter to her mother; and if this were not the fact in nature, they allege, that by the law of England the parents and the children of any proposed person are to be deemed equally near of kin to him.

I conceive, that the consideration is not, what is or ought to be deemed a fact in nature, but what has been understood, by the law of England, to be the meaning of the term "next-of-kin"; and the defendants contend, that by the law of England, the parents and the children of any proposed person are to be deemed equally near of kin to them. "The next-of-kin," according to the Statute of Distributions, is an expression frequently, though inaccurately, used. The statute of Car. 2. orders distribution among children and representatives of deceased children, or among brothers or representatives of deceased brothers; and the term "next-of-kin," according to the statute, comprehends children, who are the kindred in one degree, and children of children, who are the kindred in a degree more remote; or brothers, who are of kin in one degree, and children of brothers, who are of kindred in a degree more remote. The term "next-of-kin" is not accurately used in such cases, because other than the next or nearest of kin are comprised in it; and although it has sometimes been considered that this extended and inaccurate meaning of the term has become so far prevalent and of common use, that it might be properly attributed to the expression in a case where it was not controuled by the context, yet in deeds and wills the expression is often used in such a way as to exclude any supposed intention of comprising amongst the next-of-kin those being in a degree of propinquity more remote, and who might, under the statute, take by representation. And it has now been settled, that the expression

"next-of-kin," when used *simpliciter*, does not include such persons as could only take by representation under the Statute of Distributions. To this extent, therefore, it has been determined, that the persons who are entitled to distribution in cases of intestacy, are not, for that reason only, to be deemed next-of-kin of a person deceased. By the stat. of Hen. 8, the ordinary, in cases of intestacy, has to grant administration to the widow or next-of-kin of the deceased; and where there are several persons equal in degree and kindred, and more than one require the administration, the ordinary has to elect which shall have it; and under this statute, the child is preferred to the parent. And in the passage which, in the argument, was cited from *Blackstone*, it is said—"In the first place, the children, or, on failure of children, the parents, of the deceased, are entitled to the administration, both which are, indeed, in the first degree; but with us, the children are allowed a preference." The child which has preference in the administration, has also preference in distribution; and it has become a rule in the Ecclesiastical Court, that the right to administration follows the right to the property; but unless a preference can be considered as given, on the ground that the child is by law deemed to be nearer of kin to the intestate than the parent, we have made no advance towards a legal interpretation of the term "next-of-kin." And although it does appear to me that the common use which is made of the term "next-of-kin," in connexion with the administration and distribution of personal assets, in cases of intestacy, may occasionally have given rise to a notion that the persons to whom the law gives succession are legally, for all purposes, to be considered as the next-of-kin, yet this does not appear to be a notion which can be supported at law. The construction given to the term "next-of-kin," with reference to the statute of Car. 2, shews that the next-of-kin entitled to administration and distribution are not deemed to be next-of-kin for all purposes; and I apprehend, that, in all cases, next or nearest of kin must be construed according to the simple and obvious meaning, or according to the legal construction of the whole in-

strument in which they occur. Whatever arbitrary distinctions may have been adopted in computing collateral degrees of consanguinity, all writers on the law of England appear to concur in stating, that in an ascending and descending line, the parents and the children are in an equal degree of kindred to the proposed person; and I think that, except for the purpose of administration and distribution, in cases of intestacy, and except in cases where the simple expression may be controuled by the context, the law of England does consider them to be in an equal degree of consanguinity—the law of England gives a preference to the child over the parent in distribution; but I think we cannot, therefore, conclude, with respect to every distribution of property made in words to give the same to persons equally next-of-kin, the parents are to be held more remote than the child. If, in this case, the words of the limitation had in any way referred to the law of distribution, there would have been a guide to the interpretation; but there is no such reference—the words stand by themselves simply—the limitation is to the next or nearest of kin; and I cannot take upon myself to say, that the settlor had in his contemplation the law of distribution of intestates' estate, and intended the limitation in conformity with that law.

To act upon such an hypothesis, would be, in effect, to introduce into the settlement an implied reference to the law of distributions of personal assets in cases of intestacy; and it does not appear to me that this can safely be done. Conceiving, therefore, that by the law of England the father, mother, and child of any proposed person are equally near of kin to any such person, I am of opinion, that, at the time of Mrs. Withy's death, her father, mother, and child, being her next-of-kin, the limitation in the settlement took effect in their favour. And I think that they took the property limited to them as joint tenants, and consequently, that the plaintiff has no interest in the fund in question; and that the bill must, therefore, be dismissed, but without costs: the trustees, however, will have their costs out of the fund.

M.R.
March 1, 2, 5. }
L.C. } BONSER v. COX.
June 23, 25. }

Principal and Surety—Bond—Promissory Note.

R, together with J, as a surety, agreed to give a bond to bankers to secure advances made by them to R. & Co.; and R. & Co. agreed to give a bond to J. to indemnify him. Bonds were accordingly prepared, but the joint and several bond by R. and J. to the bankers, was never executed by R: but R. & Co. executed the bond of indemnity to J:—Held, that J. was not liable to the bankers upon the bond, as it had not been executed by R.

J. & R. gave a promissory note to a banking firm, of which R. was a member, as a security against a bill which that firm advanced for D. & Co., in which firm R. was also a member, and which latter bill was to be renewed. R. retired from the banking firm, who soon after accepted and paid another bill drawn by D. & Co.:—Held, that this last bill was to be considered as a renewal of the former bill, notwithstanding R. had retired from the banking firm, and that J. was liable upon his promissory note.

This was a creditors' suit, instituted for the administration of the estate of John Cox. Messrs. James and Robert Morrell claimed to be creditors of Cox, for 999*l.* 10*s.* upon a promissory note; 750*l.* upon another promissory note; 3,000*l.* upon a bond; and 1,200*l.* upon a promissory note; together with an arrear of interest upon these several debts. The Master disallowed these claims, and Messrs. Morrell excepted to the report, and the exceptions now came on to be heard.

The circumstances which related to the bond debt of 3,000*l.* were these:—In 1831, Mr. Richard Cox and Messrs. Morrell carried on the business of bankers in co-partnership, at Oxford, and Mr. Richard Cox was also engaged in a colliery, in partnership with David Davies, under the firm of Davies & Co. The firm of Cox & Morrell had advanced several sums to Davies & Co., who were desirous of obtaining a further advance; and in December 1831, it was agreed, that a joint and several bond should be given by Ri-

chard Cox, and by his brother John Cox, as a surety, to secure to the banking firm the payment of 3,000*l.*; and it was agreed between John and Richard Cox, that Richard Cox and Davies should give to John Cox a bond to secure him from any loss upon the former bond. A bond was accordingly prepared, dated the 10th of December 1831, and purporting to be the joint and several bond of John and Richard Cox, to secure the repayment to Messrs. Morrell of 3,000*l.* and interest. This bond was duly executed by John Cox, and was taken to Richard Cox for his execution; but he was not then at home, and by some accidental circumstances the bond was mislaid, and was never executed by Richard Cox. A bond was however given to John Cox, by Richard Cox and Davies, according to the agreement before referred to. The question raised was, whether the agreement which John Cox had entered into, was not so materially changed by the circumstance that Richard Cox had not executed the bond to Messrs. Morrell, that the estate of John Cox was not liable to Messrs. Morrell upon the bond. This was the subject of the fourth exception.

With regard to the promissory note for 1,200*l.*, it appeared, that Davies & Co. had drawn a bill for 1,200*l.*, which was accepted by Cox & Morrell; and as a security against this bill, Davies & Co. gave to Cox & Morrell a promissory note in the words following:—"12th of July, 1833.—Three months after date, we jointly and severally promise to pay Messrs. James and Robert Morrell 1,200*l.* John Cox, R. F. Cox." The note was indorsed as follows:—"This bill is given to Messrs. James and Robert Morrell, as a security against a bill they have advanced to Richard Cox and David Davies for 1,200*l.*, dated this 12th of July 1833, at three months, which is to be renewed." About ten days after this transaction, Richard Cox retired from the firm of Cox & Morrell. On the 12th of October 1833, another bill, payable at three months after date, was drawn by Davies & Co. upon the banking firm, and accepted by them, and was afterward paid by their London agents, Messrs. Jones, Loyd & Co. The question raised was, whether this bill of October 1833, being accepted by a firm consisting of different partners from those

by whom the bill of July was accepted, could be considered as a renewal of the former bill, or whether the former bill was not to be held satisfied, and the promissory note given as a security, discharged. This was the subject of the third exception.

As to the promissory notes for 999*l.* 10*s.* and 750*l.*, they were in the following form:—"Oxford, 26th of October 1831. We jointly and severally promise to pay Messrs. Cox & Morrell (999*l.* 10*s.*) for value received by a draft of three months date, this 26th of October. John Cox, Richard Cox." No such drafts as are referred to in these promissory notes were ever given, but Cox & Morrell paid some bills drawn by Davies upon Richard Cox, and it was stated this was the intention of the parties before the promissory note of John and Richard Cox had been given. The question was, whether as the consideration, for which the note of John and Richard Cox was expressed to be given, had not been received, the claim of the Messrs. Morrell upon that note could be supported. These were the subjects of the first and second exceptions.

Sheppard's Touchstone, p. 69.

Mathewson's case, 5 Rep. 23, b.

Hulme v. Coles, 2 Sim. 12.

Stevenson v. Roche, 9 B. & C. 707; s. c. 7 Law J. Rep. K.B. 304.

Warre v. Calvert, 7 Ad. & El. 143; s. c. 6 Law J. Rep. (N.S.) K.B. 219.

Calvert v. London Dock Company, 3 Keen, 638; s. c. 7 Law J. Rep. (N.S.) Chanc. 90.

Elliot v. Davis, 2 Bos. & Pul. 338.

Hawkshaw v. Parkins, 2 Swanst. 539.

Underhill v. Horwood, 10 Ves. 225.

Copis v. Middleton, Tur. & Russ. 224; s. c. 2 Law J. Rep. Chanc. 82.

Leaf v. Gibbs, 4 Car. & Pay. 466.

Donbiggen v. Bourne, 2 You. & Col. 462; s. c. 6 Law J. Rep. (N.S.) Exch. Eq. 82.

Gammon v. Stone, 1 Ves. sen. 339.

Barker v. Goodair, 11 Ves. 78.

Burn v. Burn, 3 Ves. 573.

Capel v. Butler, 2 Sim. & Stu. 457; s. c. 4 Law J. Rep. Chanc. 69.

Samuell v. Howarth, 3 Mer. 272.

Rees v. Berrington, 2 Ves. jun. 540.

Bonmaker v. Moore, 7 Price, 223.

were cited.

Mr. Bethell, Mr. G. Richards, Mr. Dixon, Mr. Pemberton, Mr. Keene, and Mr. Eade, appeared for the different parties.

March 2.—The MASTER OF THE ROLLS.—Very important questions are raised upon these exceptions. I am glad to find that there is really no doubt upon the principle the Court acts on in such a case as this. The doubt which arises (if any) is as to the application. Two of these exceptions, I think, I can dispose of without hesitation now. [His Lordship stated the facts relating to the bond.]

Now, I think, it cannot be doubted, upon any principle upon which this Court acts, that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor, and that he is not to be held bound by that which he does in any state of circumstances different from that which was contemplated by himself and all other parties, in respect of the rights and remedies which the creditor had against the principal debtor. I do not think it is material to inquire, in what way he contemplated benefit or protection for himself, in having a certain remedy held by the creditor against the principal debtor. A man may reasonably say, 'I will be surety to you for payment of such a sum for another, provided that you, who hold my bond, hold the other too; and I will not be surety on any other terms.' Surely he has a right to say that. In this case the arrangement was, that Richard Cox, as well as himself, should be held by bond to the creditor. That arrangement was never carried into effect, and the circumstance of Richard Cox being held by bond to him, the surety, does not appear to me to be material in the consideration of this question.

I think this exception cannot be sustained; and that the Master is right, because the surety had not that which he contemplated, that which was a portion, and a material portion, of the contract at the time when he entered into this obligation. There was a departure from that which he stipulated for in the contract, as subsisting between the creditors and the principal debtor, in which I conceive the surety had a most material interest. That exception, therefore, must be overruled.

The other point relates to the promissory note for 1,200*l.* [His Lordship stated the facts.]

The question, and really the only question, now in argument between these parties is, whether a bill, accepted by the two Morrells, and not accepted by Cox, is or can be considered as a renewed bill, or a bill which was accepted by both Cox and Morrell. Now, I cannot, I think, say it is so to be considered. I think the old bill was paid off, and that this was a new bill, accepted by different parties, and subject to different considerations. I think also the last exception must be overruled.

With regard to the others, I must look through the evidence.

March 5.—The MASTER OF THE ROLLS.—The case upon the exceptions which were reserved, was this: In October 1831, two bills of exchange for 500*l.* each, drawn by David Davies on Richard Cox, at three months' date, and accepted by him, were nearly due, and at the same time another bill of exchange, drawn by David Davies on John Cox, and accepted by him for the accommodation of Davies, was also nearly due: and John Cox, to enable Richard Cox to obtain from Messrs. Cox & Morrell, money wherewith to meet the two bills of exchange for 500*l.* each, and to enable Davies to provide for the bill of 750*l.*, joined Richard Cox in signing two promissory notes, one for 999*l.* 10*s.*, and the other for 750*l.* to Cox & Morrell, and each of these notes was expressed to be given for value received by a draft at three months after date. In giving these notes, John Cox was a mere surety. It appears by the state of facts, that the purposes for which the notes were given, are admitted; and from the words of the notes, it is plain, that the surety became liable upon contracts, whereby Cox & Morrell were to advance the money on three months' credit. A question was raised, whether the money advanced on the notes was applied for the purposes intended by the surety; and if it were necessary to decide that question, I should have considerable difficulty in doing so, upon the evidence as it now stands; but upon consideration, it does not appear to me that it is necessary to come to any determination on that point, for, taking the fact to be as alleged by the Messrs. Morrell,

that in both cases their advances on the notes were made for, and applied to the purposes intended by the surety, still these advances were not made by drafts on the three months' credit, but were made directly in cash within that time, and in such a way as to give to them, on each advance, an immediate demand against the principal debtor. I conceive the intention to have been, that the principal debtor should have the means of obtaining money, without being liable to any proceeding to compel the repayment thereof, until the expiration of three months; and that by the mode of advance which was adopted, the principal debtor became on each advance immediately liable to a proceeding for the recovery of the money paid to or for his use. The right of the creditor against the principal debtor was thus materially different from that which was intended by the surety, and I think it is not a sufficient answer to say, that no demand was made on the surety within the three months, for which credit was to be given. In a case at Nisi Prius, of *Bacon v. Chesney* (1), Lord Ellenborough said, "If I engage to guarantee, provided eighteen months' credit be given, the party is not at liberty to give twelve months, and after the expiration of six more, to call upon me." And so in this case, John Cox having become surety, provided three months' credit were given, I think the Messrs. Morrell were not at liberty to pay on less credit, and, after the expiration of the three months, to call upon John Cox. If the drafts had been given as intended, they might no doubt have been discounted, but in that case the payments would have been made on the discounts, and the drafts would have run their course, and have afforded the credit contracted for; but as Messrs. Morrell did not give the credit on the faith of which the surety became liable, I think that released the surety, and, consequently, that the exception must be overruled.

Messrs. Morrell presented a petition of appeal to the Lord Chancellor; and the questions were argued before him on the 23rd and 25th of June.

Mr. Bethell, Mr. O. Anderdon, Mr. Wigram, Mr. Keene, Mr. G. Richards, and Mr. Dixon, appeared for the different parties.

(1) 1 Stark. N.P.C. 192.

The LORD CHANCELLOR affirmed the decision of the Master of the Rolls, as to the fourth exception; allowed the third exception, which the Master of the Rolls had overruled; and referred it back to the Master to make further inquiries respecting the promissory notes, which were the subject of the first and second exceptions.

M.R.

May 24, 26;

June 14.

L.C.

June 16, 18.

HILTON v. LORD GRANVILLE.

Copyholds—Mining.

A copyholder applied for an injunction to restrain the lessee of the mines of coal and ironstone within the manor, from working the mines, so as to injure the copyholder's houses. The lessee claimed the right of working the mines without being liable to give the copyholders any compensation for damage which they might sustain. The mines had been worked for many years. The Court refused an injunction, but directed an action to be brought at the next assizes, to try the right which was in dispute.

The circumstances under which this case was brought before the Court are stated in the judgment.

Mr. Kindersley, Mr. Bethell, and Mr. Hardy, appeared in support of the plaintiff's application for an injunction, before the Master of the Rolls; and

Mr. Pemberton, Mr. S. Turner, and Mr. Purvis, opposed it.

Among other authorities the following were referred to:—

Gilbert's Tenures, 327.

Harris v. Ryding, 5 Mee. & Wels. 60; s. c. 8 Law J. Rep. (N.S.) Exch. 181.

Badger v. Ford, 3 B. & Ald. 153.

Bateson v. Green, 5 Term Rep. 411.

Arlett v. Ellis, 7 B. & C. 347; s. c. 5 Law J. Rep. K.B. 391.

Clarkson v. Woodhouse, 5 Term Rep. 412, n.

Folkard v. Hemmett, *ibid.* 417, n.

Birmingham Canal Company v. Lloyd, 18 Ves. 515.

Field v. Beaumont, 1 Swanst. 204.

Grey v. the Duke of Northumberland,
13 Ves. 236, 17 Ves. 281.

*Semple v. the London and Birmingham
Railway Company*, 1 N. H. and C.
Railway Cases, 480.

Bourne v. Taylor, 10 East, 189.

June 14.—The MASTER OF THE ROLLS.
—The plaintiff in this case, being entitled to two copyhold houses, in the manor of Newcastle-under-Lyne, prays for an injunction to restrain the defendant, who is lessee of the mines of coal and ironstone within the same manor, from so working his mines as to injure or endanger the plaintiff's houses. The rights asserted on the part of the plaintiff and of the defendant are legal rights, and the plaintiff asking for the assistance of a court of equity to protect him from a violation of his alleged legal right, ought to shew that the right has been established, or that, having had no means of establishing it, the right (if any) being *prima facie* well founded, the interference of the Court is necessary, to prevent that species and extent of mischief which this Court calls irremediable, before the right can be established by legal proceedings.

In this case it appears the plaintiff personally has not had any opportunity of establishing his right at law; and therefore the question is, what is the result of the evidence now adduced, as to the right which he claims, and as to the nature and extent of damage with which he is threatened, if his claim of right appears now to be well founded? The Queen, in right of the Duchy of Lancaster, is lady of the manor; crown leases of the mines of coal and ironstone within the manor have been granted, distinct from the manor itself, from a very early period, and the lessees have from time to time obtained coal in considerable quantities, and some ironstone. The houses now belonging to the plaintiff, together with many other houses, were built about the year 1797, in the immediate neighbourhood of several shafts and pits which were then open; and two of the witnesses state their belief, that, before the houses were built, cannel row coal had been obtained from under that part of the field on which the houses now are. At that time, the defendant's father, the late

Marquis of Stafford, was lessee of the mines. The defendant himself became entitled to the lease then existing in the year 1803, and renewed or additional leases have since that time been granted to him. The mines have been constantly worked, and there being houses on some parts of the surface, it is stated that in working for coal under houses, certain supports were left, to prevent injury to the houses, and that in working for coal under the open ground, as no damage to houses was apprehended, instructions were given to clear all out. In the progress of the works, however, damage was occasionally done, or was expected to be done, to buildings on the surface, and as early as 1801, some of the copyholders endeavoured to obtain enfranchisement, so that their estates might be discharged from the mines, the working of which was likely to be injurious to the buildings. The endeavour was not successful, and the mines continued to be worked. It appears from the evidence that the coal and ironstone lie to some extent in alternate strata, the vein of ironstone being sometimes above and sometimes below a bed of coal, and sometimes between two beds or veins of coal, and that the mines were principally worked for coal; ironstone in some, though not in large quantities, has, as far as the evidence goes, always been obtained. Mr. Forrester, the resident mining agent of the defendant, had proposed to obtain ironstone for smelting, about the year 1813; an increased demand for coal prevented that proposal being at that time carried into effect, and afterwards, in the year 1826, the working of the mines having, as it would seem, occasioned considerable damage to buildings, a memorial to the defendant was presented by several copyholders, who complained of the injury, and claimed to have compensation. It does not appear that at that time any question was raised as to the defendant's right to work the mines under houses. What was claimed was, that if, in working the mines, damage was done to the houses, the defendant should make compensation for such damage. He denied his liability, and refused to make any compensation, and no attempt was then made to enforce the claim. About the year 1832, the ironstone

began to be obtained for smelting, and it has ever since been obtained on an extended scale, and in much larger quantities than before.

An attempt has been made in the argument to distinguish the defendant's right to work the ironstone from his right to work the coal; but on the evidence before me there does not appear to be any difference. The defendant being the lessee of the mines of both minerals, appears to have as much right to get one as to get the other, and to be subject to no greater liability as to the one than as to the other. In the progress of his extended operations as to the ironstone, and in the year 1839 the defendant caused to be made a new level, which runs under and across three streets of the houses built about the year 1797. This level is about sixty-five yards below the surface, and the workings have been continued from it under the surface. The plaintiff's houses are at a distance of about sixty-seven yards from the level, the defendant's works have advanced from the level towards the plaintiff's houses, and many houses situated between the level and the houses of the plaintiff have been damaged.

According to the evidence adduced by the plaintiff, the damage has arisen from the further working for ironstone. Some of the witnesses for the defendant raise a doubt on that subject, and a doubt whether the injury would have arisen from the working for ironstone, if the canal row coal obtained, as it is supposed, before the houses were built, had not been improperly worked; and also a doubt whether the injury at this time may not have arisen from the working of the canal row coal so very long ago. It does not appear that all the houses under which the mining has been carried on have been injured; or, in other words, it does not appear that the extending of the works necessarily produces injury to the houses. Some have been injured, and some appear not to have been injured, but it is not denied that some houses have been considerably damaged, and though the plaintiff's houses are yet sound, it seems at least very probable they will be damaged in the progress of the works, if continued. The defendant insists he has a right to work the mines in the manner most advan-

tageous to himself; that his lease and the custom of the manor entitle him to do so; and the building of houses, even if authorized by custom and the grant of leases to be held according to the custom of the manor, cannot interfere with his right to mine. He therefore claims to be entitled to work the minerals, even at the risk of damaging the houses, and without being liable to make any compensation if damage should be actually done. He has, however, been at all times desirous to facilitate the trial of the question which, in this respect, has arisen between him and the copyholders. The plaintiff has by his bill, in language which is somewhat ambiguous, stated a claim more extensive than the relief he prays, and in the argument it has not been denied that the defendant is entitled to work the mines; and it is not alleged even that the defendant is working the mines in an improper manner, for the purpose of winning the minerals, but it is sought to enjoin him from winning them in such a way as to damage the plaintiff's houses. On the evidence now produced, I find no reason to conclude the defendant is not entitled to work the mines in a proper manner, for the purpose of obtaining the minerals which may be under the houses. It must be, and indeed is, admitted that in prosecuting such works the houses may be damaged; whether the defendant is answerable for such damage, and liable to make compensation, is a question which cannot be determined here. The facts proved shew that the copyholders have for a long time sought for compensation, without adopting any effective measures for enforcing this claim.

On the merits of the question, whether the defendant is entitled to work these mines, and do damage to houses without making compensation, it is not my intention, nor would it be proper in me, to give any opinion; but it appears to me that the view most favourable to the plaintiff, which on the evidence before me I can take is, that the defendant, though entitled to work the mines, is liable to make compensation for any damage which he may do to houses on the surface; and in this view of the case I think I ought not to grant the injunction, but must leave the plaintiff to his legal remedy, if the defen-

dant, in continuing the works, should do the damage which is expected to the plaintiff's houses. I must therefore decline to grant this injunction, giving no opinion whatever on the question between these parties, but thinking, on the evidence before me, the question is not whether the defendant has a right to work the mines at all, but whether working the mines and doing damage to the houses, he is or is not bound to make compensation: and that is a question which I cannot decide. I cannot say I am disposed to give costs. It is very desirable, if it is possible, that this matter should be tried between the parties. In the view I have taken of this matter, it has not been necessary for me to consider what is the effect of the combination which may be said to have been formed between the plaintiff and other persons; but I have a strong inclination of opinion that I ought not to notice it. It would be very desirable, and I put a question to Mr. Pemberton, very much with a view of seeing whether this suit could not be made use of to determine the right; it cannot be done, I think, between this plaintiff alone and the defendant; but observing that the solicitor of this plaintiff is the solicitor of many other persons who have a great interest in this matter, and are taking an active share in it, it does appear to me that, by a little management between the parties (otherwise it cannot be done), there might be an opportunity afforded of trying the right at law between these parties at once. If that cannot be done, it is impossible for me to interfere.

The plaintiff appealed to the Lord Chancellor.

Mr. Wigram, Mr. Bethell, and Mr. Hardy, supported the appeal; and

Mr. K. Bruce, Mr. G. Turner, and Mr. Purvis, appeared for the defendant.

June 18.—THE LORD CHANCELLOR.—This is one of the most difficult questions as to the application of the jurisdiction of this Court that I have known. The application is founded on the principle on which this Court acts, of preserving property until a legal decision on the right can be had. There is no other equity; it is an equity which this Court exercises very beneficially in certain cases, and no doubt

the subject-matter—that is to say, the house—as shewn by the evidence, in case of the workings being continued, will be exposed to danger of damage, and probably to danger of destruction, as the evidence stands. But although that would be the case with regard to the house in question, it is obviously an injury which it capable of compensation by damages, as the same time it comes within the principle of those cases where the act complained of would destroy the subject-matter in contest, viz. the house itself. But, in order to induce the Court to interfere, for the purpose of protecting property pending the decision of a legal title, it is necessary for the plaintiff to shew, at least, a strong *prima facie* case of the title to that which he asserts, and it is also necessary for him to shew that he has not been guilty of any improper delay in applying for the interposition of the Court,—not acquiescence in the sense of conferring a right on another party, but acquiescence in the sense of depriving him of the right to the interference of a court of equity.

Now with regard to the law on the subject, I am certainly desirous of abstaining from expressing any opinion, because it is a subject-matter not under my jurisdiction; but I am bound to look at it so far as to lead to the conclusion which it appears I am bound to come to, as to the mode of administering the equity of this court. I have looked at all the cases since the last argument; I have looked at all the cases which have been cited, and certainly it is impossible to say that the law is at present, as established by those cases, in a state which enables any one precisely to determine what the decision in the present case will be. There are very strong authorities in support of the plaintiff's proposition, and these are cases which appear to me to be quite irreconcilable with the principle as laid down in those cases. No doubt the more modern cases are in favour of the plaintiff; *Bateson v. Green* is the one which stands the strongest against him, not professedly overruled in any of the cases, but attempts made, which was very often done, and perhaps not always productive of good when the attempt is made, unless it was really capable of being shewn—attempts made to reconcile that

decision with the other decisions to which the Courts have come; but I find these very contrary decisions, and I find the well-known and established rule of copyhold law, that, in the case of opening mines, and in the case of timber, at least, there is nothing inconsistent in a custom which derogates from the grant. It is quite impossible to say, in the case of the common and ordinary copyhold grant of land, with a reservation of right, nothing specific passing between the parties, it is impossible to say that the custom to enter on the land and cut down all trees, is not a derogation of the grant. If you look at the nature of the grant and the terms used in the grant, it is the custom which overrides the grant, and the grant is taken subject to the custom; there is nothing inconsistent with it, unless there be something unreasonable, and therefore illegal, in the custom. There is nothing inconsistent, because you must read the grant with the supposed reservation of that which is the custom of the manor; and it is perfectly well established, a custom is good which authorises the lord to come on his copyhold tenant's land to open a shaft and work a mine; it may be destruction to the copyhold tenant, but, if the custom is proved, the custom is good; and it is a good custom for the lord, after having granted land with the timber growing on it, to enter on the land and cut down the timber. If there is no custom, neither landlord nor tenant can cut the timber; if there be a custom in favour of either the one or the other, the right exists, and the law will protect the exercise of that right. As a general proposition, therefore, that there can be no custom which derogates from the grant, I apprehend all the authorities, and the well-known law on the subject of timber and mines, shew the principle cannot be carried to that extent. *Bateson v. Green* undoubtedly carries it considerably further.

In that state of the law, I find the history of these manorial rights to be, as far as the affidavits carry back the history of them, that those rights have been universally exercised; they have been disputed and complained of, but exercised. The workings continued: no doubt it is the interest of the lord, as far as he can, to carry on his works without damage to the sur-

face; because, if he is to make compensation to the copyhold tenants for the damage done to the surface, it is obvious he is damaging himself by exposing himself to the liability of making compensation; but that there has been a long continued custom of working the mines without regard to the injury done to the surface, seems to be clear from the state of the evidence on the affidavits in this case.

Well, then, in addition to that, I have what appears to me to be a ground on which I may safely proceed, and am bound to advert, namely, I find, in *Paddock's* (1) action the third plea, stating the lord's right to enter on the copyhold land, and to work under the copyhold land, in an action of tort, in which the copyholder complained that the lord had acted illegally, and had done that which he was not justified in doing, by so working his mine as to create injury to the surface. The lord, by the fourth plea, does not dispute the fact, but says:—"I had a right to do it; I had a right to work the mine properly," or whatever the word may be; "and I had a right to do you damage, but I am bound to make you compensation." Now that is the proposition raised by that plea, in an action of tort; it is not an action in which the tenant is claiming what has become due to him for the amount of damage done to his property, but it is an action in which the lord is justifying and asserting that he had a legal right to do that which he has done, admitting the act done had caused damage to the plaintiff. On that plea so stating the right, the jury have found a verdict for the defendant; and that is, at this moment, the subject of discussion before a court of law as to what judgment is to be entered on the action in which that verdict is found.

I have, therefore, a custom established, of a pretty long duration; I have the verdict of a jury, in favour of the lord's proposition, that he has the right. Then the question comes, am I in that state of evidence of the right to prevent the lord from exercising what he claims to be his right, upon the ground that the exercise of that right will do what is the contemplation of this Court is called irreparable damage—namely, leading to the destruction of that

(1) This was an action recently brought against the defendant by another copyholder of this manor.

which is the subject-matter of the suit? In that state of circumstances, I also have this course of conduct on the part of the plaintiff. In the year 1839 the level was made. No doubt it would be for the defendant to shew the circumstances, which, he might contend, would deprive the plaintiff of the right to the interposition of this Court. I do not find any such case is made by the affidavits, because the dates are not given on which the various transactions took place which have given rise to the present question; but I find, from the plaintiff's own shewing, that in 1839, the level was made. That might have been made for other purposes, in which the plaintiff might not be interested; but, without giving any date, the plaintiff states that, from that level, the workings have continued in the progress towards his house, at a considerable distance, undoubtedly, at the commencement—I think sixty-seven yards at the commencement—gradually proceeding towards his house, and that, within a certain space of time, the works have approached within a certain ascertained number of yards from his house, and the consequence of which has been injury to those houses under which the workings have been carried. It is only of late that they have approached near to his house, and it is only of late, therefore, that any damage has been sustained by the houses near to his house. But from the moment that the workings were commenced from the level, in the direction of the plaintiff's houses, which was in October 1839, I must assume—for the contrary is not stated, but, on the contrary, it is stated that, where those houses existed under which the working has been carried on, damage has been sustained—that from the time when the workings commenced in the direction of the plaintiff's house, at least, he had this notice, there was every probability at least that the working, if continued, would bring him in contact with the assertion of the lord's right, and therefore make it necessary for him to apply for protection or compensation for the damage done. He then states—but there is no date given, and, therefore, very little effect is to be given to that—he is informed that there is another level intended to be run near his house, which will, of course, expose him to considerable

injury. There is no date given to that, but, from the time the workings commenced from the level, it is quite obvious he had at least reason to know, that, in the process of time, the workings would come towards his house, and, therefore, there was the probability of creating damage. Then no application is made, no complaint made till the time when the workings have approached so near his house that it is quite impossible to grant an injunction, which must continue till the legal right is ascertained, without imposing considerable difficulty upon, and causing destruction to, the lord's works. I turn next to equity. Under these circumstances, it is, I have to consider whether, according to the proper mode of applying the jurisdiction of this Court, to questions of this sort, the injunction ought to be granted, and I pay no regard whatever to what has been urged before me, as to an equity supposed to exist not against the plaintiff, but against some persons who are supposed to have subscribed to the expenses of the plaintiff's suit. I can only decide it as between the plaintiff and the defendant; and if the defendant has not an equity to exclude the plaintiff from his right to the injunction, he cannot borrow it from some other persons who may have subscribed to assist the plaintiff in asserting his right. Neither can I look at the case which has been urged on the part of the plaintiff, of his being under a town, and therefore involving the interest of a number of persons. I have no persons before me but the plaintiff and the defendant, and I must dispose of the case on the case raised by them, without reference to how far it may affect others. If other persons have a similar case, they may assert it, and they will receive the attention due to their case, but I cannot depart from the rule of this Court, because other persons may be interested in the result of a contest, which, before me, is merely a contest between the plaintiff and the defendant.

Now under these circumstances, seeing the state in which the law appears to stand, and the state in which the decisions appear to be, without expressing any opinion on it, and considering that, by granting the injunction, I shall be stopping the working of a mine, a thing which, of all others, this

Court is most averse to do, (though it may, under certain circumstances, be compelled to do it,) not only from the great injury which, if the Court turns out to be wrong, it is imposing on the parties working the mine, considering the great expense necessarily incurred, and the great loss sustained by the party claiming the right to work the mine; and, on the other hand, the nature of the injury which the plaintiff may sustain, if he turns out to be right. I have to consider whether, balancing the question between these two parties, and the extent of inconvenience likely to be sustained by the one and the other, it is a proper exercise of the jurisdiction of this Court, to grant the injunction as to withholding it. Now by withholding it, I certainly may expose the plaintiff not only to damage, but to an injury and a wrong by granting it, in the same way, I am exposing the defendant to what, on the event of my assuming out not to be right in the view I take of the rights of the parties, will be exposing him to a very great injury and injustice, which will be irreparable. The plaintiff's injury, if he sustained it, and ought not to have sustained it, will be, to a great extent at least, capable of reparation. It is a mere question of the value of the property, which may be compensated; whereas, by no possibility, can the injury, if done to the lord, be compensated, if he is prevented, for a considerable length of time, from working the mine which he claims to be his property, and which, in a certain event, may turn out to be his property, to the full extent for which he claims the right. But though I think I should be deciding against the proper exercise of the jurisdiction of this Court in stopping the mine at this moment, I certainly have a right to put the parties in a position which will enable them, at the earliest possible moment, to have this question of law decided between them: and as Lord Eldon said in *Gray v. the Duke of Northumberland*, the parties declining to bring their alleged rights to a legal decision, would itself furnish a ground which would influence the decision of this Court in the administration of the equity applicable to their rights. I propose, therefore, to discharge the Master of the Rolls' order dismissing the motion; and I propose to order that this motion should stand over,

the plaintiff undertaking to bring an action, to be tried at the next assizes for the county of Stafford, the defendant for that purpose admitting, which I understand he has always been ready to do, for the purpose of trying the right, that damage has been done by his working the mine. That will enable the parties to bring the case before me again during the sitting of the Court. It may be that the result of the action may enable me to dispose of it. It may be, and probably will be, that some question of law may be reserved, which will not enable me to dispose of it. At all events, I shall have the opportunity of seeing what the case is after the trial. I think that will be the most speedy way of ascertaining the rights of the parties, and enabling me more satisfactorily to determine on those rights than anything I can now do.

July 14, Aug. 14. *In re BRIDGE.*
Lunacy—Inquisition—Traverse.

It is a matter of right for a party found to be of unsound mind, on the commission of lunacy, to traverse the inquisition.

A petition was presented to the Lord Chancellor by a party who, on inquisition, had been found to be of unsound mind, praying liberty to traverse the inquisition.

It appeared from the affidavits, that the party was perfectly sane on every subject except one, in which he insisted that a lady had placed 180,000*l.* in the Bank of England for his use.

Mrs. Rogers and *Mrs. Kyle*, in support of the petition, insisted, that the application was, of course, and must be granted as a matter of right, and cited—

Ex parte Wragg, *Ex parte Ferne*, 5 Ves. 450; and *Ex parte Ward*, 6 Ves. 579.

Also the following acts of parliament relative to the right of traverse—

17 Edw. 2, c. 10.
2 & 3 Edw. 6, c. 3, s. 6.
18 Hen. 8, c. 6.
6 Geo. 4, c. 53.

By statute 2 & 3 Edw. 6. c. 13. s. 6, it is provided, "That if any person shall be untruly found lunatic or idiot, every person and persons aggrieved by such office or inquisition, shall and may have his or their traverse to the same immediately, or, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions on offices found." By statute 6 Geo. 4. c. 53 it is enacted, "that where any person shall be desirous of traversing any inquisition of lunacy, a petition for that purpose shall be presented to the Lord Chancellor within three calendar months from the return of such inquisition, who is required to hear and determine the same." The statute then proceeds to limit the time within which the party traversing shall proceed to trial, and the 2nd section enacts, "that in case the parties traversing do not duly proceed, they shall be deprived of the right of traverse, unless the Lord Chancellor shall think fit to order otherwise, on application made to him." The 3rd section of the same act provides, "that it shall be lawful for the person intrusted as aforesaid, if he shall be dissatisfied with the verdict to be returned upon any such traverse, to order one or more new trial or trials thereon, as to him shall seem meet; and as is usual in cases of issues directed by the Court of Chancery."

Mr. Winkfield and Mr. Romilly contended, that the right to traverse was not a matter of course, and that to entitle him to traverse, the applicant must show some error in the inquisition, the Lord Chancellor, and not the lunatic, being the proper judge of the finding of the jury, and that if the party had a right to traverse the inquisition as of course, it was unnecessary to present a petition to the Lord Chancellor; that it was impossible for any set of persons to pronounce the applicant capable of managing his own affairs, who did not know what they were, and who laboured under such an extraordinary delusion as that already stated; and they cited the following cases:—*1743. Ex parte Roberts*, 3 Atk. 5. *1744. In Ex parte Barnsley*, *ibid.* 184, leave to traverse was refused.

1787. In Ex parte Fust, 1 Cox, 418, Lord Thurlow said, "If this Court has a dis-

cretion, which I believe it has, in respect of permitting this inquisition to be traversed, great care should be taken in the exercise of that discretion; and the traverse was refused by his Lordship.

1800. In Ex parte Hagg, *Ex parte Berne*, 5 Ves. 450, Lord Loughborough said, "All I can do is to allow the traverse; I think it is of right, it is matter of right at law."

1805. In Ex parte Sherwood and Margaret, 10 Ves. 280, Lord Eldon said, "The private examination for the purpose of the traverse, is merely to satisfy me that it is the wish of the party to exercise the right to traverse, which, as Lord Loughborough observes, in *Ex parte Berne*, I cannot refuse."

1807. In Ex parte Hilditch, 3 Collierson on Lunacy, 144, petition to traverse by Lord Erskine.

1808. In Ex parte Ludlam, *ibid.* 167, petition to traverse—Lord Eldon refused it.

1809. In Ex parte Ludlam, *ibid.* 172, order for money, on application of counsel.

1810. In Ex parte Ludlam, *ibid.* 180, ordered rescinding an order on application of counsel.

1811. In Ex parte William Glegg, 5 B. & N. 66, the 1st of April 1801, Lord Northington's petition was presented by the lunatic for leave to traverse, and the order was made in the affirmative. The petition of the lunatic was dated the 31st of March 1802, stating that the traverse was not tried for want of special jurors, and praying that it might be tried at bar before the King's Bench, but the application was dismissed, without leave to a new application.

1820. In re John Gueset Felham, 1 Burdett's No. 156, the 22nd of November 1802, in *Ex parte Wm. Ward*, a petition for leave to traverse was dismissed without costs.

1803. In re Holyland, B. 19, No. 86, the 10th of August 1803, there was a petition presented by the lunatic for a supersedeas, which was dismissed.

1823. In re Saunders, B. 44, No. 68, December 1823, was the case of petition by the lunatic and his wife, for the commission to be superseded, or for leave to traverse, and the petition was dismissed.

1825. In re Thomas Milson, B. 46, No. 80,

the 10th of February 1825, a petition was presented by the lunatic to supersede the commission, or for leave to traverse. On the 7th of December, an order was made, restraining Thomas Clements from acting as committee; and on the 11th of December, a petition was presented by Clements that he might be approved of as committee. On the 10th of February, 1825, the order was made, that Clements should act as committee in the interim; and Clements was ordered to produce T. Milson, to the Chancellor, on Saturday the 12th instant, at 10 o'clock of the said day. 1827. *In re Thomas Milson*, B. 50, No. 138, the 28th of April, 1827, a petition was presented by Clements, stating that on the 12th of February, 1825, Clements had produced the lunatic to the Chancellor, when, as Clements understood, the Chancellor expressed himself satisfied of the lunatic's unsoundness; and on the 20th of March, 1825, the lunatic died; but there was no entry of what passed on the 12th of February, 1825. Previously to his Lordship delivering his judgment in this case, he desired that the petitioner might be produced to him, and the petitioner had accordingly an interview with his Lordship. The Lord Chancellor said, "This is a distressing case; and nothing could be more rational than the applicant was, when he appeared before me. If a party be sane on all points but one, he must be reported to be non compos mentis, and cannot possibly be said to be of sane mind; and if this were a case in which all the friends of the plaintiff could agree on making due provision for him, it would certainly be right to place him under proper protection. As regards the traverse, three of the jury expressed an opinion in favour of the sanity of the petitioner, but the majority of the jury entertained a contrary opinion; and after perusing the evidence given before the jury, I am surprised that any difference at all could arise on the question. Owing to the opinion of the dissentient jurymen, the party is deliberately anxious to be allowed to traverse the inquisition. In all cases the

state of mind must be beyond all doubt, and every care should be taken that the party be not placed under unnecessary restraint during the investigation. The right to traverse was originally given at a time when the Crown was in the habit of seizing the lands of a party found non compos mentis to its own use, and the law remains unchanged; but the necessity for applying for a traverse is in these days less pressing. However, the protection to be afforded by leave to traverse the inquisition is not to be allowed, except with the permission of the Great Seal; the enactments on the subject before me are positive ones, but they all proceed on the ground of the necessity of affording protection to the subject. The authorities are balanced. Lord Hardwicke and Lord Thurlow being of opinion that it was discretionary with the Great Seal to give permission to traverse the inquisition, and Lords Loughborough and Eldon deciding to the contrary. The opinion of Lord Hardwicke is evidenced by the cases of *Ex parte Roberts* and *Ex parte Bannley*; and that of Lord Thurlow, in *Ex parte Rush*. In *Ex parte Ferne*, Lord Loughborough speaks of the right to traverse as of course; and in *Ex parte Ward*, Lord Eldon says, "the application in *Ex parte Bannley* being on the part of a stranger, Lord Hardwicke refused it, because the application ought to have been on the part of the individual himself, who was the subject of the inquisition. In *Ex parte Skerwood* and *Mongery*, Lord Eldon held, that the traverse was one of right. If I did not entertain a strong inclination in favour of the right to challenge the finding of the jury, I am bound, where so much doubt is raised, to stand on the latest opinions on the subject, especially when it is recollected that they are the decisions of such great men as Lords Loughborough and Eldon. I think myself bound to observe, that in the case before me, I cannot conceive that any other jury will arrive at a different verdict to that already returned; and the fact of the applicant's property being so small, and inadequate to meet the many expenses that must be necessarily incurred in the further investigation, makes the case the more painful in its nature.

M. R.
Mar. 13, 15; } PAGE 8. ADAM.
July 80. }

Vendor and Purchaser—Specific Performance—Annuities.

A testator gave and devised all his estate, real and personal, to C. absolutely, subject to the payment of debts, legacies, and annuities. C. contracted for the sale of part of the devised estates, and that as debts were charged upon the estate, C. could make a good title to the purchaser, without the concurrence of the annuitants, or of all debtors.

William George Adams, late a constant General of the Court of Chancery, made his will, dated the 19th of June 1837, and thereby gave all his property, both real and personal, to his brother Sir Charles Adams, his heirs, executors, administrators, and assigns, subject to the payment of all his debts, funeral expenses, and legacies; and also, subject to several annuities, which Mr. Adams gave by his will to certain parties for their lives; and he appointed Sir Charles Adams executor of his will.

After the death of Mr. G. Adams, and on the 26th of July 1838, Sir Charles Adams sold part of his brother's estate, situate near Richmond, in Surrey, by public auction, to the plaintiff.

When the abstract of title was returned by the purchaser's solicitor, he stated, that as the will gave the property charged with debts, annuities, and legacies, satisfactory evidence must be given of their discharge. The vendor insisted, that as the testator's estates were charged with the payment of debts, he was not bound to procure releases of the annuities.

By the fifth condition of sale, it was provided, that if any objections to the title were not removed by a time mentioned in the condition, the vendor should be at liberty (by notice in writing, to be delivered to the purchaser or his solicitor) to put an end to the contract for sale.

The purchaser prepared deeds of conveyance and of release of the annuities; but the vendor's solicitor insisted, that as the debts of the testator were charged upon the estate, the vendor could make a good title without the concurrence of the annui-

tants, some of whom were under disability. The purchaser refused to waive this point, and the vendor then gave him notice, that under the fifth condition of sale, he put an end to the contract. The purchaser thereupon filed this bill for the specific performance of the agreement for sale.

It was admitted by the answer, that the testator's personal assets were more than sufficient to pay all his debts.

Mr. Pemberton, Mr. George Turner, and Mr. Miller, for the plaintiff, contended, that the object of charging an annuity upon land was, that the annuitant might always have the land to resort to: If debts and legacies were charged upon land, the sale of the land might be supposed to be made for the purpose of paying off the incumbrances; but that a sale of land charged with annuities, was *prima facie* an injury to the annuitant. The converse, therefore, of the annuitant ought to be obtained, and a release given of the land from the annuity. With regard to the advantage which the defendant attempted to take of the conditions of sale, by giving notice that he should put an end to the contract, the vendor would not be allowed to adopt such a course, unless that which was required by the purchaser was unreasonable; and the vendor could not comply with it, unless

Mr. Justice Wigram and Mr. Long, for the defendant, insisted, that the charge of debts upon the land, rendered it quite unnecessary for the purchaser to have a release from the annuitants; and, that as he persisted in his demand that the annuitants should be made parties, the vendor was entitled to put an end to the contract, by virtue of the condition of sale; and that the objection of the purchaser was an objection to the title, and not merely a question of conveyance.

Mr. Pemberton replied, that the following authorities were referred to:

- Roberts v. Widdell*, 2 Taunt. 368.
- Elliott v. Merriman*, Barn. 827.
- Bonney v. Ridgard*, cited in 2 Bro. C.C. 488.
- Shaw v. Barrer*, 1 Keen 559; 5. & 5.
- Law J. Rep. (N.S.) Chanc. 364.*
- Wynn v. Williams*, 5 Ves. 730.
- Ontario v. Hardman*, *ibid.* 722.
- Jenkins v. Hiles*, 6 Ves. 653.

Costigan v. Hastler, 2 Sch. & Lef. 166.
Johnson v. Kennett, 6 Sim. 384; s. c. 3 Myl. & K. 627.
Eland v. Eland, 1 Beav. 235; s. c. 8 Law J. Rep. (N.S.) Chanc. 289.
Hobson v. Bell, 2 Beav. 17; s. c. 8 Law J. Rep. (N.S.) Ch. 241.
Lewis v. Lozam, 1 Mer. 179.
Southby v. Hutt, 2 Myl. & Cr. 207.
Rede v. Farr, 6 Mau. & Selw. 121.
Watkins v. Cheek, 2 Sim. & Stu. 199.
Aylett v. Ashton, 1 Myl. & Cr. 105; s. c. 5 Law J. Rep. (N.S.) Chanc. 71.
Messenger v. Andrews, 4 Russ. 478.
Spackman v. Timbrell, 8 Sim. 253; s. c. 6 Law J. Rep. (N.S.) Chanc. 147.
2 Preston on Abstracts, 220.
Co. Litt. 290, b, Harg. note.

The MASTER OF THE ROLLS (after stating the case.)—The only question before the defendant gave notice to annul the contract was, whether the concurrence of the annuitants or a release from them, was necessary to give a good title to the purchaser. The will of Mr. Adam charged the whole of the estates with the payment of his debts, and with the payment of the annuities given by his will. It is admitted that if the will had charged the real estate with the payment of his debts and pecuniary legacies only, the purchaser would, in the absence of special circumstances, have been discharged from any obligation to look to the application of the purchase-money. But it is said, first, that there are special circumstances to shew that a sale of this estate was not required for the payment of debts; and secondly, that annuity legacies are different from others, and being intended to be charges on the estate, the lands must be liable in the hands of a purchaser. I do not think that there are, in this case, any special circumstances to take the case out of the common rule. The rule as to the exoneration of a purchaser from the liability to look to the application of the purchase-money, was stated by Lord Lyndhurst to be applicable to the state of things at the time of the testator's death; and the particular arrangement made by the executor for the payment of the debts. The time when they may be paid, or the funds out of which they may be paid in the first in-

stance, does not appear to me to vary the effect of the rule.

The question, therefore, is, whether the annuity legacies are different in this respect from mere pecuniary legacies. When an annuity is charged upon land, and there is no general charge of debts, it must be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity; but, in the case of *Elliott v. Merriman*, it was not considered, and the case did not require it to be considered, whether in a case where both debts and annuities were charged, the lands would be charged for the payment of the annuities in the hands of a purchaser, from the person whose duty it was to sell, for the payment of debts; and the opinion of Lord Eldon, as stated in a note to *Jenkins v. Hiles* (1), is, that "where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money: it is just the same as if the specific bequests were out of the will." I see no reason to dissent from that opinion; and conceiving that an annuity legacy charged on the estate is, in the sense here used, a specific disposition, subject to the payment of debts, I do not think that the rule ought to be departed from, owing to the nature of the legacy. The reason for the rule operates in the same manner, whether annuities or sums of money are given; and it would occasion very great difficulty if no sales of estates for payment of debts charged thereon, could take place without the authority of a court of equity. If the author of the charge for payment of debts, had also charged the estate with the payment of legacies, in the form of annuities. There are some cases in which legacies of annuities have not been distinguished from others; but as the point was not raised in those cases, I think they are not to be relied upon as authorities. But it appears to me on principle, that for this purpose there is no substantial difference between the two kinds of legacies. The charge of debts is general. The amount is indefinite. The amount may exceed the whole value

(1) 6 Ves. 654.

of the estate. It is the first duty of the executor and devisee of an estate which is subject to a charge, to pay the debts, and for that purpose he is entitled to sell. If he sells, something or nothing may be left to pay the annuities. The purchaser seems to have nothing to do with this; he cannot know or ascertain the amount of debts, and cannot, if he would, protect the annuitant. His title is derived under an authority to sell for the payment of debts—a purpose which is paramount to the payment of annuities; and in respect of the debts, he is not bound to inquire. There may be some cases in which the land being charged with debts and legacies by way of annuity, the annuitant may refuse to accept any substitute; but where the annuitant is a mere volunteer, under the will, and can only take subject to the charge for debts, he cannot prevent a sale for the payment of debts; and therefore I think the purchaser is not called on to inquire whether the executor and devisee act properly when they sell the estate; and it is not incumbent on him to look to the application of the purchase money. It therefore appears to me that in order to shew a good title, or to procure a valid conveyance, the defendant was under no obligation to procure the concurrence of, or obtain the release of the annuitant; and it appearing to me that the defendant had done

all that was incumbent upon him to do, for the purpose of shewing a good title, and that the plaintiff persevered in requiring something more, which the defendant was not bound to do, I think that the defendant did not unreasonably avail himself of the power given to him by the conditions to put an end to the contract.

I think that the question was, as it was treated by the parties, a question of title, and not merely of conveyance; and I should have thought the notice to annul the contract invalid, if the defendant had sought improperly to escape from the performance of the duty which he had undertaken by his contract. But the case here is very different, being in fact an attempt on the part of the purchaser to compel the defendant to do more than he was bound to do. As the defendant gave this notice to annul the contract only because the plaintiff insisted on a release from the annuities, and as the plaintiff has, at the bar, expressed his desire to have a specific performance of the contract, even in the event of the question as to the annuities being determined against him, it may be that both parties may now be desirous that the purchase should be completed, under the direction of the Court. If they are, there can be no objection to giving directions for that purpose, if they are not, I think that this bill must be dismissed with costs.

END OF TRINITY TERM, 1841.

THE NEW ORDERS

FOR THE REGULATION OF THE PRACTICE AND PROCEEDINGS OF THE COURT OF CHANCERY.

Issued by the Lord High Chancellor, 26th of August 1841.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, doth hereby, in pursuance of an Act of Parliament, passed in the fourth year of the reign of her present Majesty, intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fourth and fifth years of Her present Majesty, intituled "An Act to amend an Act of the Fourth Year of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" order and direct in manner following; that is to say,

I. That there shall be forthwith prepared a proper Alphabetical Book for the purposes after mentioned, and that such book shall be called the Solicitors' Book, and shall be publicly kept at the Office of the Six Clerks, to be there inspected without fee or reward.

II. That every Solicitor, before he practise in this Court, in his own name solely, and not by an Agent, whose name shall be duly entered as after mentioned, and every solicitor, before he practise as such Agent, shall cause to be entered in the Solicitors' Book, in alphabetical order, his name and place of business, or some other proper place in London, Westminster, or the Borough of Southwark, or within two miles of Lincoln's Inn Hall, where he may be served with writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications in causes and matters depending in this Court; and as often as any such Solicitor shall change his place of business or the place where he may be served as aforesaid, he shall cause a like entry thereof to be made in the Solicitors' Book, and that the above-mentioned entries shall be made in such book by the said Six Clerks, who shall be entitled to a fee of one shilling for every such entry; and that the fund arising from such payment shall be applied, in the first instance, in paying the expenses of providing and keeping such book.

III. That all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, which do not require personal service upon the party to be affected thereby, shall be deemed sufficiently served if such document, or a copy thereof, as the case may be, shall be left at the place lastly entered in the Solicitors' Book by the Solicitor of such party; and if any Solicitor shall neglect to cause such entry to be made in the Solicitors' Book as is required by the Second Order, then the fixing up a copy of any such writ, notice, order, warrant, rule, or other document, proceeding, or written communication for such Solicitor in the said Six Clerks' Office, shall be deemed a sufficient service on him, unless the Court shall, under special circumstances, think fit to direct otherwise.

IV. That if any Solicitor shall give his consent in writing that the service of all or any writs, notices, orders, warrants, rules, or other documents may be made upon him through the Post-Office or otherwise, such service shall be deemed sufficient

if made in such manner as such solicitor shall have so agreed to accept; but it shall be competent for any Solicitor giving such consent, at any time to revoke the same by notice in writing.

V. That no person shall be allowed to appear or act, either in person, by Solicitor or Counsel, or to take any proceedings whatever in this Court, either as plaintiff, defendant, petitioner, respondent, party intervening or otherwise, until an entry of the name of his Solicitor and his Solicitor's Agent, if there be one, or if he act in person, his own name and address for service shall have been made in the Solicitors' Book at the office of the Six Clerks; but if such address of any person so acting in person shall not be within London, Westminster, or the Borough of Southwark, or within two miles of Lincoln's Inn Hall, then all services upon such person not requiring to be made personally, shall be deemed sufficient if a copy of the writ, notice, order, warrant, rule, or other document to be served, be transmitted to him through Her Majesty's Post-Office, to such address as aforesaid.

VI. That no Writ of Attachment with proclamations, nor any Writ of Rebellion, be hereafter issued for the purpose of compelling obedience to any process, order, or decree of the Court.

VII. That no order shall hereafter be made for a messenger, or for the Serjeant-at-Arms, to take the body of the defendant for the purpose of compelling him to appear to the Bill.

VIII. That if the defendant, being duly served with a subpoena to appear to and answer the Bill, shall refuse or neglect to appear thereto, the plaintiff shall, after the expiration of eight days from such service, be at liberty to apply to the Court for leave to enter an appearance for the defendant. And the Court, being satisfied that the subpoena has been duly served, and that no appearance has been entered by the defendant, may give such leave accordingly; and that thereupon the plaintiff may cause an appearance to be entered for the defendant. And thereupon such further proceedings may be had in the cause as if the defendant had actually appeared.

IX. That upon the Sheriff's return, *non est inventus*, to an attachment issued against the defendant for not answering the Bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same; and that the person suing forth

such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a Writ of Sequestration in the same manner that he is now entitled to such writ, upon the like return made by the Serjeant-at-Arms.

X. That no Writ of Execution, nor any Writ of Attachment shall hereafter be issued for the purpose of requiring or compelling obedience to any order or decree of the High Court of Chancery; but that the party required by any such order to do any act, shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

XI. That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a Serjeant-at-Arms, and such other process as he hath hitherto been entitled to upon a return, *non est inventus*, by the Commissioners named in a Commission of Rebellion issued for non-performance of a decree or order.

XII. That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order, which shall be served upon the party required to obey the same, there shall be indorsed a memorandum, in the words, or to the effect following; *viz.*—"If you, the within named A. B., neglect to perform this order by the time therein limited, you will be liable to be arrested by the Serjeant-at-Arms attending the High Court of Chancery; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

XIII. That upon due service of a decree or order for delivery of possession, and upon proof made of demand and refusal to obey such order, the party prosecuting the same shall be entitled to an order for a Writ of Assistance.

XIV. That the memorandum at the foot of the subpoena to appear and answer, shall hereafter be in the form following; that is to say,—"Appearances are to be entered at the Six Clerks' Office in Chancery Lane, London, and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you; and you will be subject to an attachment and the other consequences of not answering the plaintiff's bill, if you do not put in your answer thereto within the time limited by the General Orders of the Court for that purpose."

XV. That every person not being a party in any cause, who has obtained an order, or in whose favour an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

XVI. That a defendant shall not be bound to answer any statement or charge in the Bill, unless

specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the Bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the Bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

XVII. That the interrogatories contained in the interrogating part of the Bill, shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c., and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the Bill, in the form or to the effect following; that is to say,—"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c., and the office copy of the Bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole Bill.

XVIII. That the note at the foot of the Bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the Bill, and the addition of any such note to the Bill, or any alteration in or addition to such note after the Bill is filed, shall be considered and treated as an amendment of the Bill.

XIX. That instead of the words of the Bill now in use preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore—That the said defendants may, if they can shew why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer; that is to say,—"

1. Whether, &c.

2. Whether, &c.

XX. That a defendant in a country cause shall be allowed no further time for pleading, answering, or demurring to any original or supplemental Bill, or Bill of Revivor, or to any amended Bill, than is now allowed to a defendant in a town cause.

XXI. That after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an original Bill, if the defendant shall have filed no plea, answer, or demurrer, the plaintiff shall be at liberty to file a note at the Six Clerks' Office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the case made by the Bill, and the plaintiff had replied to such answer, and served a subpoena to rejoin." And that a copy of such note shall be served on such defendant in the same manner as a subpoena to rejoin is now served, and such note when filed (a copy thereof being so served), shall have the same effect as if the defendant had filed an answer, traversing the whole of the Bill, and the plaintiff had filed a replication to such answer, and

served a subpoena to rejoin. And after such note shall have been so filed, and a copy served as aforesaid, the defendant shall not be at liberty to plead, answer, or demur to the Bill without the special leave of the Court.

XXII. That a plaintiff shall not be at liberty to file a note under the Twenty-first Order, until he has obtained an order of the Court for that purpose, which order shall be applied for upon motion, without notice, and shall not be made unless the Court shall be satisfied that the defendant has been served with a subpoena to appear and answer the Bill; and that the time allowed to the defendant to plead, answer, or demur, not demurring alone, has expired.

XXIII. That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the Bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the Bill, whether the same be an original, or amended, or supplemental Bill, omitting the interrogating part thereof: and such Bill, as against such party, shall not pray a subpoena to appear and answer, but shall pray that such party, upon being served with a copy of the Bill, may be bound by all the proceedings in the cause. But this order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the Bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit.

XXIV. That where a plaintiff shall serve a defendant with a copy of the Bill under the Twenty-third Order, he shall cause a memorandum of such service, and of the time when such service was made, to be entered in the Six Clerks' Office, first obtaining an order of the Court for leave to make such entry, which order shall be obtained upon motion without notice, upon the Court being satisfied of a copy of the Bill having been so served, and of the time when the service was made.

XXV. That where a defendant shall have been served with a copy of the Bill, under the Twenty-third Order, and a memorandum of such service shall have been duly entered, and such defendant shall not within the time limited by the practice of the Court for that purpose, enter an appearance in common form, or a special appearance under the Twenty-seventh Order; the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the Bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the Bill.

XXVI. That where a party shall be served with a copy of the Bill under the Twenty-third Order, such party, if he desires the suit to be prosecuted against himself in the ordinary way, shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way. But the costs occasioned thereby shall be paid by the party so appearing, unless the Court shall otherwise direct.

XXVII. That where a party shall be served with a copy of the Bill under the Twenty-third Order,

and shall desire to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance under the following form; (that is to say,) "*A. B.* appears to the Bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party entering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the Court shall otherwise direct.

XXVIII. That a party shall not be at liberty to enter such special appearance under the Twenty-seventh Order, after the time limited by the practice of the Court for appearing to a Bill in the ordinary course, without first obtaining an order of the Court for that purpose; such order to be obtained on notice to the plaintiff, and the party so entering such special appearance, shall be bound by all the proceedings in the cause, prior to such special appearance being so entered.

XXIX. That where no account, payment, conveyance or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the Bill, the costs occasioned by the plaintiff having required such party so to appear and answer the Bill, and the costs of all proceedings consequential thereon, shall be paid by the plaintiff, unless the Court shall otherwise direct.

XXX. That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the Court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

XXXI. That in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

XXXII. That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

XXXIII. That where a demurrer or plea to the whole Bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by the Twenty-first Order, and with the same effect, unless the Court shall, upon overruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, answer, or demurrer, within the time so allowed by the Court, the plaintiff, if he does not

require an answer, shall, on the expiration of such time, be at liberty to file such note.

XXXIV. That where the defendant shall file a demurrer to the whole Bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days from the expiration of the time allowed to the defendant for filing such demurrer, cause the same to be set down for argument: and where the demurrer is to part of the Bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall within three weeks from the expiration of the time allowed for filing such last-mentioned demurrer, cause the same to be set down for argument.

XXXV. That where the defendant shall file a plea to the whole or part of a Bill, the plea shall be held good to the same extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

XXXVI. That no demurrer or plea shall be held bad and overruled upon argument; only because such demurrer or plea shall not cover so much of the Bill as it might by law have extended to.

XXXVII. That no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

XXXVIII. That a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and that he shall be at liberty to decline, notwithstanding he shall answer other parts of the Bill from which he might have protected himself by demurrer.

XXXIX. That where the defendant shall, by his answer, suggest that the Bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the Registrar's Book, in the form or to the effect following; (that is to say,) "Set down upon the defendant's objection for want of parties;" and that where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his Bill by adding parties: but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

XL. That if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

XLI. That where a defendant in equity files a cross Bill against the plaintiff in equity for discovery only, the costs of such Bill, and of the an-

swer thereto, shall be in the discretion of the Court at the hearing of the original cause.

XLII. That where a defendant in equity files a cross Bill for discovery only against the plaintiff in equity, the answer to such cross Bill may be read and used by the party filing such cross Bill, in the same manner, and under the same restrictions, as the answer to a bill now praying relief may now be read and used.

XLIII. That in cases in which any exhibit may by the present practice of the Court be proved *vidæ voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vidæ voce* at the hearing.

XLIV. That where a defendant makes default at the hearing of a cause; the decree shall be absolute in the first instance, without giving the defendant a day to shew cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shewn by the defendant.

XLV. That every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master to inquire and state to the Court what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

XLVI. That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of 4l. per cent. from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

XLVII. That a creditor who has come in and established his debt before the Master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the same shall be taxed by the Master, and added to the debt.

XLVIII. That in the reports made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or sued before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

XLIX. That it shall not be necessary in any Bill of Revivor, or supplemental Bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it.

L. That in any petition of rehearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.

LI. That the foregoing Orders shall take effect as to all suits, whether now depending, or hereafter commenced, on the last day of Michaelmas Term, One thousand eight hundred and forty-one.

COTTENHAM, C.
LANGDALE, M.R.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Exchequer in Equity.

BY
EDWARD COOKE, Esq., BARRISTER-AT-LAW.

FROM MICHAELMAS TERM, 1840, TO TRINITY TERM, 1841,
BOTH INCLUSIVE.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer in Equity.

COMMENCING WITH

MICHAELMAS TERM, 4 VICTORIÆ.

C.B. }
Nov. 10. } OLDFIELD v. CORBET.

*Contempt—Bill pro confesso—Answer—
2nd Rule of 1 Will. 4. c. 36.*

The 2nd rule of 1 Will. 4. c. 36. does not apply to proceedings in the Court of Exchequer, the words "last-mentioned rules" in the 20th section of the act, referring only to rules from 5 to 20 inclusive, directed to be adopted by the 19th section.

Quære, when a defendant is brought up under the 6th rule, whether it is incumbent on the plaintiff to examine the defendant as to the cause of his not answering, or on the defendant to plead his excuse.

The defendant, being in contempt for want of an answer, had been brought up to the bar of the Court, and committed to the Fleet prison. He was now brought up again, on the 2nd rule of the 1 Will. 4. c. 36, in order that the bill might be taken *pro confesso* against him. The question was, whether the second rule applied to proceedings in the Court of Exchequer.

Mr. K. Parker.—The 19th section of the act directs, that the rules from 5 to 20, both inclusive, shall be adopted by the Court of Exchequer, and the 20th section

NEW SERIES, X.—EXCHEQ. IN EQ.

declares, that the powers and authorities contained in "such last-mentioned rules," and given by this act to the Lord Chancellor, shall and may be exercised in like manner, and are hereby given to the Court of Exchequer, and may be exercised by the said Court, or by the Lord Chief Baron thereof. The difficulty arises upon the words "last-mentioned," which seem to apply only to the rules from 5 to 20: yet it must have been the intention of the legislature, that all the rules should be adopted by this Court, because the act was to assist prisoners committed for contempt. It is submitted, therefore, that the words "last-mentioned" apply to the whole of the rules.

[LORD ABINGER, C.B.—That would be inconsistent, after ordering the Court to adopt them from 5 to 20. Does not the 6th rule apply to your case?—"If the defendant makes oath that he is unable through poverty."]

He has been brought up under that rule, and never took advantage of it; he did not plead poverty.

[LORD ABINGER, C.B.—The rule says, he shall be examined in open court. You ought to have examined him.]

The practice of the Court of Chancery

B

under that rule is, if he pleads poverty, then to examine him. The defendant is present when the application is made to commit him, and may allege anything that he can as an excuse for not putting in his answer; but he never did plead poverty.

The application was refused, the Court being of opinion, that rule 2 of the 1 Will. 4. c. 36, did not apply to proceedings in the Court of Exchequer, the words "last-mentioned," in the 20th section of the act, being referable only to the rules from 5 to 20, both inclusive, directed to be adopted by this Court, in the immediately preceding section.

C.B. }
Nov. 23. } PLUMB V. PLUMB.

Amendment, Costs of—Delay—Parties.

Plaintiff, who was in contempt for previous costs, moving to amend after replication by adding a party whom he knew to be a necessary party for two years past, ordered to pay the costs of his application as a condition precedent to his obtaining the order, and to undertake to amend in three days, without prejudice to the defendant moving to speed the cause.

Mr. Simpkinson and Mr. Dixon moved that the plaintiff might be at liberty to withdraw his replication, and amend by striking out eleven acres, claimed by the bill, and making T. C. P. a party defendant. The first part of the motion was afterwards abandoned.

Mr. Follett, contra, objected, that the plaintiff was in contempt, and therefore could not apply; and, secondly, that he had been guilty of great delay, for that the fact of T. C. P. being a necessary party was known two years ago, and that he had not complied with the 15th of Lord Lyndhurst's orders, in swearing to the materiality of the amendment, or satisfactorily accounted for the delay; and contended, that the defendant was entitled to the common order to speed.

Mr. Spence, for other defendants, asked, that the plaintiff might be ordered to pay

the costs of this application, before he was allowed to amend.

Mr. Simpkinson, in reply.—There is no reason why the Court should go out of the common rule, and make the payment of costs a condition precedent. The plaintiff being in contempt is no impediment to his bringing his cause to a hearing. The 78th of Lord Bacon's orders is confined to a party coming forward voluntarily, and asking for indulgences—*Ricketts v. Mornington* (1). This is a similar case. The application is only to be at liberty to do that which is necessary to bring the cause to a hearing. The plaintiff must have leave to amend in this way at the hearing; and is, therefore, entitled to ask it now.

LORD ABINGER, C.B.—This exception to the rule is confined to cases in which the application made is necessary to the hearing; if it would follow then, you are entitled now to stand in the same predicament. But as the fact was known to the plaintiff so long ago, and as he was in contempt for non-payment of costs, I shall protect the defendant from costs, by making the payment of the costs of this application a condition precedent to granting the order. The amendment to be made in three days, and without prejudice to the defendant moving to speed the cause.

ALDERSON, B. }
Dec. 4, 5. } SHARPE V. SHARPE.

Evidence—Will—Advancement.

The testator, by his will, directed that his son H. should have the option of purchasing the good-will, &c. of his business, the purchase-money to form part of his residuary estate. The testator died in 1835, and H, who from 1820 had managed the business, and resided solely on the premises, as apparent owner, claimed it as an advancement, and alleged a parol agreement between him and the testator in 1825; and as proof thereof, gave in evidence declarations of the testator, about that time, to his neighbours, that he had set up H. in business, and had asked their custom for him:—Held, that as there was no direct transfer or proof of

(1) ? Sim. 200; a. c. 4 Law J. Rep. (n.s.) Chanc. 21.

change of possession, the parol declarations of the testator could not countervail his solemn declaration expressed by his will.

The testator, James Sharpe, carried on the two several trades of a pawnbroker and tallow-chandler, at different establishments, his son Joseph conducting the pawnbroking business, and his son Henry the tallow-chandler's business, and each residing upon the respective premises. The testator died in 1835, and by his will, dated the 10th of June 1831, appointed his three sons, Joseph, Henry, and Benjamin, his executors, and therein directed that his son Henry should have the option of purchasing, at a valuation, the good-will and stock in trade, and the household furniture on the premises in which the tallow-chandler's business was carried on; and in case of his declining to purchase, then the same were to be sold by his executors: the proceeds in either case to form part of his residuary personal estate. After the testator's death, Henry claimed to hold the tallow-chandler's business, and the stock in trade, &c. as a gift or advancement by the father in his lifetime. Benjamin then filed his bill for the administration of the testator's estate against his two co-executors, Joseph and Henry, claiming that this business formed part of the personal estate of the testator, who employed Henry merely as his agent. The answer of Henry admitted, that before 1825, the testator carried on the tallow business for his own benefit, but that, in February 1825, he and the testator came to an account, and that the business was valued at 500*l.*, and it was agreed between them, that Henry should be indebted to the testator in that amount, and that the concern should thenceforth wholly belong to Henry. By agreement between the parties at the hearing, it was referred to the Master to inquire whether Henry became entitled, and from what time, and on any and what terms and conditions, to the household furniture on the premises in which the business of a tallow-chandler was carried on, and to the stock in trade, good-will, and effects of or belonging to such trade; and to inquire whether any and what consideration had ever been paid for the same. The Master found that Henry did not become entitled

to the furniture, &c., and that no consideration was paid for the same. The evidence taken before the Master, on the part of the plaintiff, was that of John Cofield, apprentice to Henry, in the business, from 1823 to 1828, to the effect that the testator, after the time of the alleged agreement in 1825, interfered in the business as before, served customers, and inspected the books; and that when tallow was required to be purchased to a large amount, he consulted his father and asked permission to make the purchases; and that the accounts thereof, when sent in, were examined by Henry Sharpe, who wrote "correct" upon them, and directed them to be taken to the house of the testator for payment. Bankers' books were also produced to shew, that the testator had drawn cheques for the payment of tallow supplied to the trade. On the part of the defendant, a book marked A was produced, purporting to be a valuation of the stock, &c. in 1825, in the handwriting of John Sharpe, deceased, a son of the testator, which was headed "Henry Sharpe in account with James Sharpe," and in which Henry was stated to be "indebted" to his father in 500*l.* Several witnesses, who lived near the tallow-chandler's shop, deposed to declarations made to them, by the testator, about the time of the alleged transaction, to the effect that he had built the premises for his son Henry, and had set him up in business, and that he had asked them to give him a turn. There were also three bonds for contracts for the supply of goods to Greenwich Hospital, in which Henry was treated as principal, and the testator, as surety, was described as a pawnbroker; but, as the testator's seal had been cut off, (it did not appear by whom,) the Master refused to receive them as evidence. No books were produced by Henry, to shew the manner in which the business was carried on from 1825. It was admitted, that the testator had established this business for the benefit of his son Henry, but the plaintiff insisted that the benefit intended by the testator for Henry, was the option of purchasing given by the will.

Mr. Bethell and Mr. Steer, for the exceptions.—In a transaction of this kind between father and son, that strict degree of evidence is not required to substantiate a

parol agreement which would be in the case of a stranger. *Prima facie* it must be intended as an advancement, even though the testator should indicate a change of intention by his will.

Dyer v. Dyer, 2 Cox, 92.

Finch v. Finch, 15 Ves. 43.

Murless v. Franklin, 1 Swanst. 13.

[ALDERSON, B.—In all those cases there was an *actual* transfer; here, the circumstances only amount to evidence of a transfer.]

It was all the transfer the nature of the property allowed.

[ALDERSON, B.—You have not gone into any evidence as to whose name was painted over the door, and by whose order, or which of them was rated to the poor. Those would be strong facts.]

After ten years possession by the son, the affirmative of the issue must be on the other side, who must make out a *prima facie* case that he is not entitled.

[ALDERSON, B.—The presumption of law is the other way. You admit that the testator was in possession till 1825, and you must shew the change of possession.]

Then as to the bonds to Greenwich Hospital, the father represented himself as a surety merely; and as that was a contract with government, it must be taken most strongly against him—*Russell v. Austwick* (1).

Mr. Spence and *Mr. Blount*, *contrà*.—In order to make out a parol agreement, the agreement itself must be clear, and the declaration clear, and a clear change of possession must be shewn, that is, that the possession is held in a different character. Here, if the declarations of the testator are to be received, the will also of the testator must be taken as his most solemn declaration.

ALDERSON, B.—In *Finch v. Finch*, and the other cases cited, there was distinct proof of an *act done*. In this case, as there is no evidence of a direct transfer of the business, you must take all the declarations of the testator together. The will of the testator must be taken as his most solemn determination; and what evidence is there

to counterbalance that? The Master was to inquire whether Henry Sharpe became entitled, &c., and from what time. The first question raised before me was, upon whom was the affirmative of the issue. A decision upon that is immaterial; because, if it is conceded in the case that on the 24th of February 1825 the business was the testator's, and the plaintiff further proves, that from that time to the death of the testator things remained in the same situation, and the business was carried on as before, and that the goods brought into the concern were paid for by the testator, to a great extent at least; and that the custom of Henry Sharpe was upon large transactions to take the opinion and ask the permission of the testator, and that when the creditors of the concern brought their bills to write "correct" upon them, and direct the creditors to go, not to his own banker's, but to the testator, for payment of the specific sum, not asking the testator to advance money generally,—all this it was natural for an agent to do, and it shews that he was in possession as agent, the principal furnishing the capital and interfering in the concern. All this happened after 1825, so that it is incumbent on Henry Sharpe to prove the contrary. It is said, that in February 1825, John Sharpe made a valuation of the stock, which amounted to about 500*l.*, and that it was agreed that Henry Sharpe should have the business, and be indebted to his father in that sum. How is that evidence of an advancement? It is evidence of a contract, if anything, and the consideration not paid. What else is there to induce me to think the Master wrong? There are the declarations of certain persons who heard the testator say, that he had set Henry Sharpe up in business: that Henry Sharpe had embarked some of his own money in the business. If it is a question of the balance of testimony, then it is contradicted by the witness Coffield, and also by the merchants who supplied goods. It has been attempted to be proved that Henry Sharpe furnished the monies to the testator, on his own account, and received the cheques of the testator for the amount; but it is not said these advances were not the monies from the trade belonging to the testator. There is nothing to shew the contrary. If they had been Henry Sharpe's monies,

(1) 1 Sim. & Stu. 52.

there would have been some account between them, but none is produced. Upon the whole, the evidence sustains the proposition, that the property was in the testator in 1825, and continued so to the time of his death.

Exceptions overruled.

ALDERSON, B. } GRANT v. GRANT.
Dec. 11.

Legacy, Time of Payment—Age.

Testator directed the property to be paid to the legatee upon the day she attained her 25th year:—Held, that the legatee was entitled to payment immediately after completing her twenty-fourth year.

Mary Hayes, by her will, after bequeathing various legacies, gave all her residuary personal estate to trustees, in trust for her adopted child, Julia Grant, the petitioner, with the following direction: "And her property I should wish to be paid into her own hand, upon the day she attains her 25th year, and not till then." A suit having been instituted for the administration of the testatrix's estate, the sum to which the petitioner was entitled under the will, was paid into court. This was the petition of Julia Grant, praying that the same might be paid out to her. It appeared by the report of the Master, that the petitioner was born on the 11th of September 1816, and was therefore about twenty-four years and three months old.

Mr. Simpson and Mr. Beavan, for the petitioner.

Mr. Temple, for the trustees, contended, that the intention of the testatrix was, that the money should not be paid to the petitioner till she had completed her twenty-fifth year.

ALDERSON, B.—If the words had been when she attained twenty-five years, it would have been so. Here it is when she shall have attained her twenty-fifth year; which she did as soon as she arrived at and entered upon her 25th year.

Ordered as prayed.

C.B. }
May 1, 16. } YARNOLD v. WALLIS.

Will—Codicil—Devise—After purchased Estates.

A being seised of real estates at F. and H, devised all his estates at F. and H. to his eldest son W. in tail, with remainder over to his second son B. for the like estate. A afterwards purchased other real estates at F, and then made a codicil, duly executed to pass real estate, directing the same to be taken as part of his will, by which he gave the first tenant in tail a power of charging the estates given him by the will, but did not mention the after-purchased estates. W, as heir-at-law of the testator, sold the after-purchased estates, and died without issue. B, the next in remainder under the will, brought his bill against the purchaser to recover the same:—Held, upon demurrer, that the after-purchased estates passed by the will and codicil, as being sufficiently covered by the words of the will.

The exceptions to the general rule, that a codicil duly executed will pass real estates purchased after the date of the will, are founded upon this, that supposing the testator to have repeated his will verbatim in the codicil, there would still be a necessity for new words to pass the after-purchased estates.

The testator, W. Yarnold, by his will, bearing date the 5th of November 1823, duly executed and attested, gave all his freehold estates and hereditaments, with the appurtenances thereunto respectively belonging, situate and being in the parishes of Finchley and Hendon, in the county of Middlesex, to his eldest son, William Yarnold the younger, and his heirs. But in case W. Yarnold should die without issue, or leaving issue which should happen to die before their attainment of the age or respective ages of twenty-one years, then the testator gave the same to his second son, Benjamin Yarnold, the plaintiff, for the like estate, with further remainders over. In 1826, the testator purchased other freehold property in the parish of Finchley; and he afterwards made a codicil to his will, bearing date the 24th of March 1827, and duly executed and attested to pass real estate, which was as fol-

lows:—"A codicil, to be taken as part of the last will and testament of me, W. Yarnold, of, &c. I desire and direct that the part or share of the rents and profits of my leasehold estate in Lower Grosvenor Place, which by my will Mary Gilmour would be entitled to for her life, shall only be paid to her so long as she continues single and unmarried, &c. I do hereby give and empower my son, W. Yarnold, when in possession of the estates given to him by my will, to charge the same or any part thereof, either by deed or will, or by any codicil in the nature of a will, with any annual sum or sums of money not exceeding the annual sum of 200*l.*, to his present wife, or to any future wife with whom he, my said son, may afterwards marry, for the term of her natural life."

The codicil contained no reference to the after-purchased property at Finchley.

After the death of the testator in 1827, William Yarnold, the son, entered into possession of the estates at Finchley devised to him by the said will, and also of the after-purchased premises at Finchley, and, on the 14th of December 1832, conveyed the last-mentioned premises by lease and release to the defendant Wallis. In October 1834, William Yarnold the younger died without issue. This was a bill by Benjamin Yarnold; and it prayed, that he might be decreed entitled, from the death of W. Yarnold the younger, to the after-purchased property at Finchley, for such estate as was limited to him under the will and codicil of William Yarnold, the testator.

The cause now came on on demurrer.

Mr. Tripp, for the demurrer.—This property did not pass by the will and codicil. In the early stage of the doctrine, it was always held, that there must be an indication of intention in the codicil to pass lands purchased after the date of the will; and that rule prevailed until the case of *Acherley v. Vernon* (1). In *Bowes v. Bowes* (2), the codicil was held not to amount to a republication; and that case is on all fours with the present; for here the testator gives power to his son to charge the *same* lands he had given him by his will with an annuity, shewing that

the after-purchased lands were not in his mind at the time. In *Monypenny v. Bristow* (3), it was held, that where a codicil, in its dispositive part, is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing the will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. The testator in that case had used the words, "that the codicil was to be taken as part of his will." In *Hughes v. Turner* (4), a codicil duly attested, by which the testator revoked an annuity and a devise and a legacy to a deceased trustee, and appointed a new trustee, was held not to be a republication of the will. There is no authority to shew, that where the after-purchased property is not referred to in the codicil, and the property in the will is, that the codicil is a republication. The case of a purchase by a stranger from the heir-at-law is entitled to favour.

Mr. Spurrier, for the plaintiff, contra.—If the codicil had the effect of republication, it made the will speak of "all the estate" as of the date of the codicil. The old rule required some expression of intention, but that doctrine has been long exploded. In *Barnes v. Crome* (5), Lord Commissioner Eyre says, "If we disentangle ourselves from the rule, that there shall be no republication without re-execution, the principle that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear." In *Pigott v. Waller* (6), Sir W. Grant thought he was bound by the decision in *Barnes v. Crome*, even though he was of opinion that the old rule was the best. In *Hulme v. Heygate* (7), the codicil specified *some* of the after-purchased estates, yet it was held to amount to a republication of the will as to all. In *Goodtitle v. Meredith* (8) it is said, that the codicil has an operation *per se*, except that is repelled by a contrary intention appearing. In *Rowley v. Eyton* (9), the will charged all the estates with

(3) 2 Russ. & Myl. 117; s. c. 1 Law J. Rep. (N.S.) Chanc. 88.

(4) 3 Myl. & K. 666.

(5) 1 Ves. jun. 486.

(6) 7 Ves. 98.

(7) 1 Mer. 285.

(8) 2 Mau. & Selw. 5.

(9) 2 Mer. 128.

(1) Com. 381.

(2) 2 Bos. & Pul. 500.

payment of debts; there was an after-purchase of copyholds, and a codicil specifically devising them; yet the codicil was held to be a republication, so as to charge the copyholds with the debts. The cases of exception are where the language of the codicil manifests a *contrary* intention—*Strathmore v. Bowes* (10), *Bowes v. Bowes*, *Smith v. Dearmer* (11). The decision in *Parker v. Biscoe* (12) is only, that where a will is partially revoked, the codicil has not the effect of republishing that part which is revoked. The question is, whether any inconsistency would arise from giving the codicil the effect now contended for. The testator, by the codicil, has given the tenant in tail what he had not before—a power to charge certain estates with an annuity; over the other estates, he has given him no such power. The power of charging is limited, by the instrument creating it, to the “same” estates; but the effect of the codicil, in point of interest, extends to the after-purchased estates. Here is no inconsistency, and no evidence of a *contrary* intention.

Mr. Tripp, in reply.—*Bowes v. Bowes* was distinctly put on the ground of intention, and not upon inconsistency. So also in *Hughes v. Turner*. The plaintiff wishes to have a partial republication, not as to the charge which the words exclude, but as to the estates.

LORD ABINGER, C. B.—This case was argued upon demurrer, and the question was upon the construction of a will and codicil. The bill is filed by a person who claims as a remainder-man, under a devise in the will, against a purchaser from the heir-at-law of the testator; and the question is, whether a codicil which was made after the execution of the will, and after the purchase of the estates in question, would operate so as to pass the estates so purchased after the date of the will. That is the only question; and it was argued very ably on both sides. I was ready to have given judgment on it then; but it seemed to be thought of more importance than it

at first sight struck me to be, and therefore I took time to consider it. My opinion still remains the same; and therefore I must overrule this demurrer. The question is, whether the codicil amounted to a republication of the will, so as to pass the intermediately purchased estates. The estates devised by the will were estates in the parishes of Finchley and Hendon, and the estates purchased afterwards were also estates in Finchley. It seems, that the testator, having devised his estates at Finchley and Hendon to his eldest son in tail, with remainders over to the younger branches of the family, afterwards purchased other estates in Finchley, and then made a codicil to his will, which is in these words:—“A codicil, to be taken as part,” &c. (*vide supra*, the codicil). Now, upon these words it is said by the defendant, that this codicil makes the case fall within the exception, and takes it out of the general rule, which is, that a codicil duly made to pass real estate amounts to a republication of the will, so as to make the will bear date with the codicil, and to affect all the lands the testator had at the time of his making the codicil. This is said to be the general rule. It cannot be disputed that it was the rule as to personal property after, and that it was the rule as to real estate before, the Statute of Frauds; and it has been the rule ever since, when the codicil was so attested as to pass real estate. I need not repeat the cases. I believe all of them were cited, and are all well known, from *Acherley v. Vernon* downwards. There appears, then, to be some exceptions to this rule. Upon what are they founded? When the cases on which they depend come to be examined, it will be found, that those exceptions do not militate against the general rule, but they are founded on this—that, supposing the testator had actually, at the very time he made his codicil, repeated his will, and made it a part of the codicil, there must be new words in one or the other to pass the newly-purchased estates. Look at *Bowes v. Bowes*, the principal case on the subject. There the testator, having made a devise in his will of all his lands and tenements to certain trustees in the will mentioned,

(10) 7 Term Rep. 482.

(11) 3 You. & Jer. 278.

(12) 8 Taunt. 699.

for certain purposes therein mentioned, and having, a few years afterwards, purchased other lands, subsequently made a codicil: that codicil revoked the devise in his will, and devised the same lands by the use of the words "said lands." He stated, that whereas he had devised his lands in his will to such and such trustees for certain purposes, his intention was to revoke that devise; and then he devised his "said lands" to new trustees for the same uses: and that was the whole of his codicil. Now, observe for a moment what the line was which the Court of King's Bench, as well as the House of Lords afterwards, upon appeal, took on this subject. They considered, that the words in the codicil operated as a revocation, and that the devise related to those lands the testator was possessed of at the time he made his will, and no other; because he revokes the devise in his will, and devises the *said lands*—that is, the "said lands" mentioned in his former will. Now, suppose he had actually repeated the very words of his will, saying, "that all the lands he was possessed of at the time of the date of his will be thereby devised to certain trustees for certain purposes," but said nothing of the other lands—that would have been the case of a republication of the will undoubtedly; but neither the will nor codicil contained any words of devise of new lands, and therefore they would have gone to the heir-at-law. I mention this, because it would seem as if something turned on republication. If a man republish his will, and it do not contain words of devise of land newly purchased, it cannot pass that land. Suppose a man devise lands by a specific name, and afterwards purchase lands in a different county, so that they do not correspond, then the republication of the will will not devise the new estates, but they will go to the heir-at-law. Therefore, it does not turn on republication, but whether the codicil, taken together with the will, contains any words to devise the new estates. If they do not, the new estate is not devised. The case of *Monypenny v. Bristow*, decided by Lord Brougham, was considered by him a stronger case than *Bowes v. Bowes*; and it will be found that was a

revocation of the devise, i. e. of the said lands. Whether Lord Eldon and Lord Rosslyn were right in their mode of construing the word *said*, or whether Lord Thurlow was right, who took a different view of it, is not the question. It was decided, that the word *said* limited the devise, as well as the revocation, to the lands that had been before devised, as there were no words, either in the will or codicil, to pass the new lands. In this case, the lands purchased are exactly named as the lands devised. They are lands at Finchley; and it is admitted on general principles that the republication of the will transfers the date of the will to the date of the republication; and if the codicil forms part of the will—if the testator declares it to be so, it must be incorporated with the will. If this codicil is incorporated with the will, there is nothing to shew any intention not to pass these lands, and there is nothing to shew that these lands are not properly described. The description, in the will, will suit the newly-purchased lands—viz. "lands at Hendon and Finchley"; and all the codicil says about those lands is, that "I give and empower my son William, when in possession of the estates given him by my will, to charge the same." If this will formed part of his codicil, and were incorporated with it, the power given by the codicil would extend over all the lands, the new as well as the old. Mr. Spurrier seemed to think the power was limited to the devise of lands in the former will. I do not think he is right about that: I should think the power applied to both. Suppose the will had been dated at the time the codicil was dated—suppose it to be, as the codicil is, a republication of the will, and to form part of the will, why then the will devises all his lands at Finchley and Hendon. That would comprise the newly-purchased lands. Therefore, there are sufficient words to pass the newly-purchased lands; and the will must be taken to be dated at the date of the codicil, and after the new lands were acquired, and consequently passes the whole. The demurrer, therefore, must be overruled.

Demurrer overruled.

ALDERSON, B. }
 Dec. 17, 1840. } ANDERSON v. WALLIS.
 Jan. 20, 1841. }

Parties—Misjoinder of Plaintiffs—Prochein Amy—Legatee.

A, by his will, gave renewable leaseholds to W. and his wife, in trust to renew, &c., and out of the rents and profits in the first place, to pay the fines, &c., and as to the residue, to the wife for life, remainder to the children of the marriage. He then charged his residuary personal estate with payment of an annuity to D, and made Mrs. W. his executrix and residuary legatee. To a bill by D. on her own behalf, and also as next friend of the infant children, against W. and his wife, praying, first, the payment of the arrears and the investment of a sufficient part of the residuary personal estate to answer the growing payments of her annuity, and secondly, that the trusts of the leaseholds might be carried into execution, and the trustees decreed to renew, an objection of the misjoinder of the co-plaintiffs was taken at the hearing, and allowed on the ground of the numerous inconveniences that might follow from a suit so framed, and that no final decree could be made thereon which would do complete justice to all parties.

Robert Marshall, the testator, by his will, dated the 6th of November 1820, gave to William Wallis and Maria, his wife, (the testator's daughter,) lands held under the Dean and Chapter of Durham, by four several leases, renewable every fourteen years, upon trust to do every act necessary for obtaining new leases of the same property, as often as W. Wallis and Maria, his wife, should think proper; and out of the rents, &c. to pay the rents reserved, and the fines attending the renewals, and to pay the residue to Mrs. Wallis for life, for her separate use, with remainder to the children of the marriage; and he made Mrs. Wallis his executrix and residuary legatee. The testator also charged his residuary personal estate with the payment of an annuity of 25*l.* a year to the plaintiff Mrs. Anderson. A bill was filed by Mrs. Anderson on her own behalf, and also as next friend of the infant children of Mr. and Mrs. Wallis, against Mr. and Mrs. Wallis and their adult children, stating the

will of Robert Marshall, and that her annuity was in arrear, and that the leases had been neglected to be renewed according to the trusts of the will, and that one of them, by the custom of the dean and chapter, would become unrenovable on the 23rd of January 1841, and that a much larger premium would be required for renewals of the other three, than if they had been renewed at the proper time. The bill prayed, that the defendants Mr. and Mrs. Wallis might be decreed to pay the arrears of the annuity, and also to invest a sufficient part of the residuary personal estate of the testator to answer the growing payments; and if assets were not admitted, then for an account; and that the growing payments might be paid to the plaintiff Mrs. Anderson, and that the trusts of the will as to the leasehold estates, might be carried into execution; and that it might be referred to the Master to ascertain the annual value of the leasehold premises; and that the defendants might be decreed to procure renewals, &c., and for a receiver.

The cause coming on for hearing, an objection was taken on the part of the defendants as to the misjoinder of the plaintiffs.

Mr. Stuart and Mr. Faber, for the defendants.—Mrs. Anderson has nothing to do with these leases. The bill does not pray that the profits of the leaseholds may be applied in payment of the annuity. But it may be said both parties claim under the will of Marshall. The principle upon which two legatees claiming a separate benefit under the same will may join, is, that they have a common interest in working out the assets, for if there is a deficiency, their legacies will abate in proportion; but a specific legatee cannot join with a general legatee. Mrs. Anderson has no interest in compelling the father to renew, and the infants have no interest in the payment of her annuity. Suppose Mrs. Anderson's complaint as to her annuity should be dismissed, she would still appear as a plaintiff upon the record, in long inquiries as to a subject-matter in which she has no interest. In such a case, the Court will stop the suit in any stage—*Cholmondeley v. Clinton* (1). Again, the death of one co-plaintiff is an abatement of the whole suit

(1) 4 Bligh, O.S. 123.

—*The King of Spain v. Machado* (2), *Cuff v. Platell* (3). The plaintiffs are suing the defendants in distinct characters, the wife as executrix, and the husband and wife together as trustees. Besides, the plaintiffs have conflicting rights; for if Mr. Wallis is to be compelled to invest money for securing the annuity, he will be less able to renew the leases—*Lambert v. Hutchinson* (4), *Bill v. Cureton* (5).

Mr. Simpkinson and Mr. Pigot, contra.—The objection that the plaintiffs have not a common interest, goes too far; for that would prevent general pecuniary legatees and a residuary legatee joining. The plaintiffs have all some interest in having the trusts of the will carried into execution. In *Campbell v. Mackay* (6), one of the co-plaintiffs was a specific legatee, and no objection was taken on that ground. In all the cases of demurrer on this ground, there was either no interest or conflicting interests. *Cholmondeley v. Clinton* was a case of conflicting interests. *Knye v. Moore* (7) is explained by *Dunn v. Dunn* (8). This is no case of conflicting interests, and there is nothing in it which relates to anything dehors the trusts of the will. Besides, the objection should have been taken by demurrer, or raised by the answer, that the defendants might have had an opportunity of curing it by amendment. *Raffety v. King* (9) is a direct authority, that the objection comes too late at the hearing—*Wilkinson v. Parry* (10), *Lambert v. Hutchinson*. A quasi conflict of interest is not sufficient to prevent the Court making a decree, provided it can do so consistently with the justice of the case—*Moseley v. Lord Hawke* (11), *Mortimer v. West* (12), *Storey v. Johnson*

(13). In *England v. Downes* (14), the Court did not dismiss the bill, but gave liberty to amend. The same principle is applied in the case of multifariousness—*Ward v. Cooke* (15), *Wynne v. Callander* (16), *Whaley v. Dawson* (17).

[ALDERSON, B.—When the case comes to a hearing, multifariousness does not impede the right decision of the case.]

There is here no inconsistency, to prevent the Court coming to a right decision. The only objection that can be made is, that there ought to be two bills. There is no conflict, for the annuitant admits the rights of the specific legatees. It resolves itself, therefore, into an objection for multifariousness, and comes too late. If there is any inconvenience, it is the inconvenience of the plaintiffs, who have united themselves for the purposes of this suit.

[ALDERSON, B.—That would be a strong observation, if some of the plaintiffs were not infants.]

Mr. Stuart, in reply.—The grounds of objection for multifariousness and for misjoinder, are perfectly distinct; therefore, many of the cases cited are not applicable. This is not a suit for general administration, or to recover specific legacies, for the legatees are in the enjoyment of them, but to act upon the directions in the will, and to work out a benefit to the ulterior objects of the testator's bounty. In *England v. Downes*, the defect could be cured by amendment—here it cannot. Suppose a decree appropriating a fund as a security for the annuity, and also as to the renewal of the leases: how strange would it be to have such a decree stopped by the death of the co-plaintiff, Mrs. Anderson. The inconvenience is so great, that the Court will make no decree.

[ALDERSON, B.—Suppose I were to decide against Mrs. Anderson's claim rightly, and as next friend, in her favour; and then she died; the suit would abate, though the only remaining matter would be that in which it ought not to abate at all.]

Judgment postponed.

(13) 2 You. & Col. 586; s. c. 5 Law J. Rep. (N.S.) Ex. Eq. 9.

(14) 1 Beav. 96; s. c. 9 Law J. Rep. (N.S.) Chanc. 313.

(15) 5 Mad. 122.

(16) 1 Russ. 293.

(17) 2 Sch. & Lef. 372.

(2) 4 Russ. 225; s. c. 6 Law J. Rep. Chanc. 61.

(3) Ibid. 242; s. c. 1 Law J. Rep. Chanc. 2.

(4) 1 Beav. 277; s. c. 8 Law J. Rep. (N.S.) Chanc. 196.

(5) 2 Myl. & K. 512; s. c. 4 Law J. Rep. (N.S.) Chanc. 98.

(6) 1 Myl. & Cr. 618; s. c. 6 Law J. Rep. (N.S.) Chanc. 73.

(7) 1 Sim. & Stu. 61; s. c. as — v. Moseley, 1 Law J. Rep. Chanc. 18.

(8) 2 Sim. 329; s. c. 6 Law J. Rep. Chanc. 175.

(9) 1 Keen, 619; s. c. 6 Law Rep. (N.S.) Chanc. 87.

(10) 4 Russ. 272.

(11) 2 You. & Jer. 521.

(12) 3 Russ. 370; s. c. 5 Law J. Rep. Chanc. 181.

January 20, 1841.—ALDERSON, B.—It is not, I think, necessary to hear the counsel for the defendants upon the merits of this case. as, after consideration, I have come to the conclusion, that this bill must fail upon the preliminary objection, which has been fully argued. It is not necessary for me to state again at length the principles which seem to me to govern these questions, as I have so lately stated them in the case of *Davies v. Quarterman* (19). Applying them, however, to the circumstances of the present case, it appears to me, that the misjoinder of the plaintiffs in a case like the present, prevents me from making with justice a final decree. Here, in fact, are two suits wholly unconnected with each other. One plaintiff seeks relief, in which the other is neither directly nor indirectly concerned; and, which is an additional circumstance of inconvenience, the plaintiff who claims relief for herself in one suit, is claiming another relief as the next friend of the infants in the other. If she die, the suit will abate; though, as to that portion of it which she has instituted as next friend, it would not abate but for the misjoinder. Again, supposing the Court to decide her own suit in her favour, and the other branch of it against the infants, I do not see in what way the infants can procure redress, in case the plaintiff, as next friend, refuses to take any further steps. Or if the reverse were to take place, the infants might be delayed in the redress awarded to them by an appeal, interposed by their own next friend on her own behalf. It was said, that these inconveniences arise to the plaintiffs from their own act of misjoinder of suits; and ought not to be relied on. This, if true as to some cases, is not, however, applicable to this, in which infants are interested. On the whole, it is admitted, that this objection is one in which it is for the Court to exercise its discretion; and as no case can be cited in which such a joinder of plaintiffs has been allowed, and as many inconveniences will follow, from allowing it, affecting any decree which the Court would be in this case likely to pronounce, I think I shall best exercise that discretion by dismissing this bill.

Objection allowed, and the bill dismissed, with costs.

(19) See post, p. 17.

C.B. }
Jan. 22. } JONES v. MOORE.

Pleading — Multifariousness — Want of Equity.

A, B, and C, on their separate account respectively, put on board the defendant's ship certain casks of oil to be conveyed to L. During the voyage several of the casks leaked, and such leakage oil was sold by the defendant's agent, before the arrival of the ship at L. for 750l. A, B, and C, not being able to distinguish how much belonged to each, enter into an agreement to apportion the proceeds among themselves, and require the defendant to pay the money to them in such proportions. The defendant refuses to comply, and brings separate actions against A, B, and C for freight and average. To a bill filed by A, B, and C, against the defendant for an account, and to restrain the actions at law, the defendant demurred; first, for want of equity; secondly, for multifariousness. The demurrer was overruled; on the first ground, because A, B, and C could not set off in the respective actions their agreed proportions of the 750l. against the demand for freight, &c.; and, on the second ground, as it was not possible to distinguish what part of the oil sold belonged to each respectively, and they were tenants in common of the whole, and such common interest entitled them to maintain their joint bill in equity.

The bill stated, that in July 1839, the vessel *Dorothy Gales* was lying in the port of Columbo, in the island of Ceylon, and soon afterwards was advertised to take in cargo. That A B, as agent of the defendant Moore, received on board on account of the plaintiffs respectively, certain quantities of cocoa-nut oil for the purpose of conveying the same to London; viz. on account of John Jones ten tons, on account of J. B. sixteen tons, on account of Scott & Co. twenty-two butts, on account of Forbes & Co. sixty hogsheads; and that bills of lading of the goods shipped on board were duly signed by A B, wherein it was agreed, that the goods were to be delivered in London, and the charge for freightage, &c. to be at the rate therein mentioned. During the voyage several of the oil casks had leaked, and the oil that escaped had been pumped up from the hold and put into other casks, which oil was afterwards mixed up by

A B; and sold by him at St. Helena in one mass, and the net proceeds of such sale received by A B amounted to 750*l*. The vessel arrived in London in 1830, when the plaintiffs, on discovering their loss, and the sale of the oil by A B, being unable to ascertain what quantity belonged to each respectively, agreed to apportion the proceeds amongst themselves, and required the defendant to pay 750*l*. among them, according to such proportions. This the defendant refused to do, but commenced actions against J. Jones, and against Bell & Co. for the freight and average of their oil, and against Forbes & Co. for the freight and average of their oil, and also for the freight of thirty bales of cinnamon. The bill charged, that the plaintiffs were entitled to set off against the claims of the defendant, the monies arising from the sale of the oil, but that by reason of that sum not having been appropriated among the plaintiffs, they were unable to avail themselves of the set-off at law, and that the said sum of 750*l*. greatly exceeded the whole amount of the monies payable by the plaintiffs, in respect of freight and average, and that the defendant was in embarrassed circumstances. The bill prayed a declaration, that the plaintiffs were entitled to the money arising from the sale of the oil, and that an account might be taken of what was received by the defendant in respect thereof, and that the sum found due might be apportioned among the plaintiffs, according to their agreement, the plaintiffs offering that the sums due from them for freight, &c. should be first retained by the defendant; and, if necessary, for an account of the same, and for an injunction against the defendant's proceeding in the actions, and for a commission to examine witnesses abroad. To this bill the defendant put in a general demurrer, on two grounds, first, for multifariousness; and, secondly, for want of equity.

Mr. Romilly, for the demurrer.—There is nothing in this question which could not be determined at law. There is no case made for an account, viz. payments on one side, and receipts on the other. The plaintiffs have prayed no relief which they might not have had at law. The commission to examine witnesses they might have had at law. A simple bill of discovery in aid of their defence at law would have been the proper pro-

ceeding. But they have endeavoured, by a claim of cross demands, to make a case for an account.

[*LORD ABINGER, C.B.*—Could they plead the set-off at law? The oil was sold in one mass; how could they shew how much belonged to each?]

As to multifariousness, there are three distinct actions brought against the plaintiffs for distinct demands, and these are not all in respect of the same thing. In one, there is the additional claim of freight for cinnamon; and, therefore, the reasoning of the Master of the Rolls, in *Harrison v. Hogg* (1), applies unanswerably to this case. Such a bill was allowed in *Kensington v. White* (2), but that case has been much doubted—*Stor. Eq. Plead.* 340, and Lord Cottenham's observations in *Campbell v. Mackay* (3). So in *Shackell v. Macaulay* (4), where the bill prayed a commission to examine witnesses in aid of a defence at law to two separate actions, the demurrer was allowed, because it might retard or prejudice the proceedings of the plaintiff at law in one action, by requiring him to wait till the depositions in both were returned.

Mr. Simpkinton and Mr. Lewis, for the bill.—The argument on the part of the defendant would go to shew, that the plaintiffs have no remedy in any court. None of the cases cited are applicable, except *Campbell v. Mackay*, which is conclusive against the demurrer. The Lord Chancellor, in p. 618, says, "The result of the principles to be extracted from *The Attorney General v. the Merchant Tailors' Company* and *The Attorney General v. the Goldsmiths' Company* negatives the proposition, that where there is a common liability and a common interest, the common liability of the defendant and the common interest of the plaintiffs, different grounds of property cannot be united in one and the same record. On the contrary, both those cases are consistent with the doctrine that they may be so united." Every ingredient exists in this case. The plaintiffs here are tenants in common, though in unascertained propor-

(1) 2 Ves. jun. 323.

(2) 3 Price, 164.

(3) 1 Myl. & Cr. 624; s. c. 6 Law J. Rep. (N.S.) Chanc. 73.

(4) 2 Sim. & Stu. 79; s. c. 3 Law J. Rep. Chanc. 27.

tions, of the oil sold by defendant's agent. Where a plaintiff is proceeding at law to gain an advantage, which he is not entitled to, a court of equity will restrain him—*Williams v. Davis* (5). Here the forms of legal proceedings will not allow a set-off, and yet the defendant seeks to recover the amount of freight, though indebted to the plaintiffs in a greater amount. *Mills v. Campbell* (6) confirms the doctrine of *Kensington v. White*.

Mr. Romilly, in reply.

LORD ABINGER, C.B.—There is one thing in which the parties have a common interest. They all have a common interest in the oil that was pumped up and sold. There are two circumstances that make them tenants in common; they cannot ascertain how much was lost in each cask belonging to each. For it has been mixed up by the defendant's agent, and has been sold in one mass; and it is impossible by any process of law to distinguish one part from the other. I recollect a case at law, vide *Whitehouse v. Frost* (7), where ten tons of oil, part of a larger quantity, were sold, and the price paid. The seller refused to deliver it, and an action of trover was brought against the persons who had detained it; and there was some doubt, as the part sold was not separated from the mass, whether the purchaser could bring trover for those ten tons. The Court, however, after much doubt, allowed him to maintain his action. But the doubt would have been much stronger, if the oil had diminished in quantity. Here the individual parties could not bring trover, for the captain had sold the whole in one mass, and if one of them did, it might well be asked, "How do you know that the whole of your oil which leaked was not actually lost?" The mode of coming at the rights of the parties is in equity. You cannot at law have them all before the Court. What the defendants in the action at law seek is, to have a set-off in a court of equity. Suppose they had agreed among themselves as to the proportion that should belong to each, and the only question was, that the owner of the ship should account for the proceeds; that agreement would

not give them any new title against him at law, if he should refuse to hand over the money; and there would be this difficulty at common law, that if he resisted the action so brought by one of them, this agreement could not be given in evidence; but the defendant would put the plaintiff to prove, that it was his oil that was sold. The agreement to take a certain proportion would not prove that fact, or advance his right in any way. This difficulty makes it a proper case for equity. Again, if one of them only brought his bill against the ship-owner, there might be great difficulty, unless the Court bound all the parties. The having made an arrangement, would not bind the defendants or plaintiffs in equity, unless all the parties were before the Court; and that would be either by this defendant filing a bill against them all, or by their filing a bill against him for a settlement. They have become by events tenants in common, because the portion of each is not separated, and cannot be. They might maintain a joint action for injury done, and why should they not maintain a joint bill in equity? This bill does contain matter which is the fit subject of proceedings by all the plaintiffs against the defendant.

Demurrer overruled.

ALDERSON, B. }
Feb. 18, 19. }

POPE & GARLAND.

Vendor and Purchaser—Specific Performance—Leasehold Estate—Objectable Covenants.

The particulars of sale of leasehold property, described it as parcelled out into small lots, with houses built thereon, and let for long terms at a fixed ground-rent upon each, with the exception of two lots of ground let as gardens to tenants at will, the whole producing to the purchaser a yearly income of 120l., and in conclusion, stated that the whole property was held on a lease for forty-nine years, at a ground-rent of 86l. per annum. The abstract of title shewed a reservation in the original lease of a rent of 80l., and such additional yearly rent as should be equal to one-third of the improved yearly rent, and also contained some stringent covenants. To the Master's report of a good title, the purchaser took exceptions, on the ground of misrepresentations and unusual covenants:—

(5) 2 Sim. 461.

(6) 2 You. & Col. 391; 7 Law J. Rep. (N.S.) Ex. Eq. 2.

(7) 12 East, 614.

Held, first, that there was no misrepresentation; secondly, that the principle, that a purchaser of a fee, stated to be subject to leases, is to be deemed to have notice of all the contents of the leases, applies equally to the purchaser of a particular lease.

The property in question, by an order in the cause, had been put up to auction on the 2nd of December 1839, and Charles Stephens was declared the highest bidder, for the whole of the premises described in the particulars, at the sum of 510*l*. On a motion on behalf of the plaintiff, for payment of the purchase-money into court with interest, an order was made referring it to the Master, as to whether the plaintiff could make a good title to the said estate comprised in the said lot, and when such title was first shewn, with liberty to state special circumstances.

In the particulars of sale, the property was described as the leasehold estate of the late W. Law, situate at Peckham, and was more particularly specified as parcelled out into small lots, with dwelling-houses erected thereon, underlet for long terms at a fixed ground-rent reserved on each, with the exception of No. 3, described as a house and garden, let to C. P, tenant at will, at 20*l*. per annum, and the last lot described as a large piece of garden ground about 4½ acres, let to J. D, tenant at will, at the low rent of 20*l*. per annum. The total amount of rents to be received by the purchaser, including that paid by the two tenants at will, was summed up at 120*l*. And the particulars concluded thus, "All the property as described in this lot, is held on lease for an unexpired term of forty-nine years, from Christmas-day, 1839, at a ground-rent of 86*l*. 14*s*. 2*d*. per annum," leaving a clear income to the purchaser of 34*l*. 3*s*. 4*d*. The affidavit of the purchaser used before the Master, stated that he was the owner in fee of two pieces of land containing 14 acres, immediately adjoining the piece of ground described in the particulars as 4½ acres of garden ground let to J. D, as tenant at will, and that his principal object in purchasing the property, was to build on the said 4½ acres of garden ground, in connexion with his own land immediately adjoining. That by the abstract of title, it appeared that the original lease under

which the property was held, was dated the 29th of May 1823, and made between C. Shard, as lessor, of the one part, and W. Law, as lessee, of the other part, and that the yearly ground-rent reserved, was 80*l*., "and such further or additional yearly rent or sum of money beyond the said yearly rent of 80*l*., as should be equal to one-third of the improved yearly rent or value to the said W. Law, his executors, &c., of the premises thereby demised, after payment of the said yearly rent of 80*l*." And that in such lease, there was a covenant by W. Law, his executors, &c., that no dwelling-house to be erected on any part of the premises thereby demised, should be of less value than 200*l*., or 21*l*. per annum. And also a covenant or agreement in these words, "And it is hereby declared and agreed by and between the parties hereto, that for the better ascertaining the further or additional yearly rent, which is from time to time to be paid to the said C. Shard, his heirs or assigns during the said term, beyond the said yearly rent of 80*l*., all leases and agreements for leases of all or any part of the said piece or parcel of ground and premises at any time or times hereafter to be granted by the said W. Law, his executors, &c., to or with any person or persons whomsoever, together with the counterpart thereof, shall be prepared by the solicitor for the time being, of the said C. Shard, his heirs or assigns, at the costs of the said W. Law, his executors, &c., or his or their under-tenants, the said solicitor making a reasonable charge for the same. And further, that such ground-rents shall be laid on every house or parcel of ground, part of the premises, when and as the same shall be allotted out, or divided, or agreed to be leased for building by the said W. Law, his executors, &c., as shall be reasonable according to the judgment of the surveyor for the time being of the said C. Shard, his heirs or assigns. And that the said W. Law, his executors, &c., shall not accept or take any fine or premium, or gift upon and for granting any lease or leases, or assignment or assignments of any part of the said messuages or tenements, or piece or parcel of ground, (except for the assignment or assignments of any houses and buildings which shall have been actually erected, and on which the

ground-rents shall have been previously ascertained and laid on in manner afore-said,) without the consent of the said C. Shard, his heirs, &c., in writing, first had and obtained, and that then and in such case the said C. Shard, his heirs, &c., shall receive and be entitled to one-third of such fine or premium." There was also the usual proviso for re-entry, on non-payment of the rent or breach of the covenants. The affidavit went on to state, that the deponent was altogether ignorant of the actual nature and amount of the ground-rent, or of the covenants in the lease, till the delivery of the abstract of title; and that if he had known of them, he would not have bid nearly so high a sum as 510*l.* for the said lot.

In pursuance of the order of reference, the Master certified that a good title could be made to the said estate. To this report, the purchaser excepted, for that the Master ought to have found that the plaintiff could not make a good title for the following reasons:—First, that the particulars of sale represented the premises as held under an original lease for forty-nine years from Christmas, 1839, at a fixed ground-rent of 86*l.* 14*s.* 2*d.*; whereas, the rent reserved by the original lease, was a fixed rent of 80*l.*, and such further or additional yearly rent or sum of money, &c., (vide *suprà*, the covenants as to the additional rent, and the preparation of the leases, and the fixing of the ground-rent). Secondly, that no valid assignment to the purchaser of the said lot, or at least of the premises in the occupation of J. D. and C. P., as tenants at will, could be made in consideration of any sum of money, without the consent of the persons entitled to the reversion, as no ground-rent had been ascertained or laid on the said premises in the manner mentioned in the original lease, and that no such consent had been given or offered to be procured; and that it had not been shewn who were the persons whose consent was necessary. Thirdly, that consequently the purchaser could not have a sufficient discharge for his purchase-money under the circumstances. Fourthly, that there was no evidence in the abstract, that J. D. and C. P. were tenants at will, but that they claimed to hold as tenants from year to year, or for some greater interest.

Fifthly, that the covenants in the original lease were unusual and objectionable.

Mr. Stuart and *Mr. Stevens*, for the exceptions.—The particulars of sale describe it as a leasehold property at a ground-rent of 86*l.* 14*s.* 2*d.* The abstract discloses a different state of things, a ground-rent of 80*l.*, with such further additional rent, &c. This is a misrepresentation. The object of the purchaser was to employ it as building land, but he cannot do that without hampering himself with an additional rent, and he cannot even fix a rent to his own under-tenants. This is not an objection to the conveyance, but to the title. Nothing that materially affects the eligibility of the property, can be considered as the subject of compensation. The utmost extent to which the Court has gone, has been in the case of quit-rents, as being incidents of tenure—*Esdaile v. Stephenson* (1). In *Cadman v. Horner* (2), Sir William Grant held that misrepresentation, though in a slight degree, was an objection to a specific performance. The objection taken, is not an objection to the conveyance, but an objection to the title—*Bliss v. Collins* (3). See also *Sugden's Vendors*, vol. 1, p. 161, and the cases there cited—*Stewart v. Alliston* (4).

Mr. Simpkinson and *Mr. Bacon*, *contrà*.—The only question before the Master was, whether the vendor could make a good title. The objections raised, are upon collateral points, and respect the question of compensation. But as to that, the purchaser is bound by constructive notice of the covenants in the lease—*Hall v. Smith* (5). Notice of a lease is notice of its contents—*Walter v. Maunde* (6), *Barraud v. Archer* (7). This was a fixed rent, though liable to be increased in certain cases; and at the time of the sale, the rent payable was 86*l.* 14*s.* 2*d.*

Mr. Stuart, in reply.—The cases cited refer to the purchase of the fee simple of estates described as under lease—1 *Sug-*

(1) 1 Sim. & Stu. 122.

(2) 18 Ves. 10.

(3) 4 Mad. 231.

(4) 1 Mer. 26.

(5) 14 Ves. 426.

(6) 1 Jac. & Walk. 181.

(7) 2 Sim. 433; s. c. 9 Law J. Rep. Chanc. 173.

den's Vendors, 11. The rule should seem to be confined between vendor and purchaser, to a contract actually executed and the purchase-money paid.

[ALDERSON, B.—That is only Sir E. Sugden's opinion of what the law ought to be.]

Walter v. Maunde is an authority that the purchaser ought to have property of such a kind as the particulars of sale described. Has the purchaser got substantially what he was buying? *Bliss v. Collins* shews that this is not a matter of compensation, but a question of title. *Hall v. Smith* was decided upon a misapprehension of *Taylor v. Stibbert* (8). In *Flight v. Booth* (9), the particulars of sale stated a lease with a covenant that certain offensive trades should not be carried on. The covenant was found to extend also to other trades, and that was held such a material discrepancy as to entitle the purchaser to rescind the contract. In that case, there was no misrepresentation in words, but only a concealment. The vendors cannot sell this property without the consent of the reversioner, and that consent has not been procured. That is an objection to the title—*Esdaile v. Stephenson*, *Wynn v. Griffith* (10).

ALDERSON, B.—I agree to the principle which seems to be laid down in *Hall v. Smith*, that where a lease is stated, it is the business of the purchaser to look at the clauses, if it materially influences his judgment. I cannot distinguish between this case and the case of a landlord selling his property, and stating that it is under lease. The Court has held, where property is described as in the hands of tenants or under leases, that it is the duty of the purchaser, if he is disposed to make inquiries upon the subject, to ask what are the terms of the leases, so that he may know what he purchases, whether property over which he has certain rights, or over which his rights will be restricted. Is there any difference in principle in the particular purchase of a lease? The con-

ditions under which the lease is held, only make the land more or less valuable; just the same as in the case of the landlord selling. Can the purchaser object to the title, if there should be any covenant burdensome to the vendor? If he cannot, then it remains for the purchaser of a leasehold estate to see what he is purchasing, and all the undertaking on the part of the vendor, is to make a good title to that lease, and the purchaser is to be deemed to have constructive notice of the terms of the lease. That then makes an end of the question, except there is misrepresentation, by which the vigilance of the purchaser is set to sleep, and he is induced to believe the contrary. The vendor then is bound by that representation, and that explains the case of *Flight v. Booth*, because there the covenant turned out to be of a much more stringent nature than that described in the particulars of sale; for if a lease is stated with a particular covenant, that implies that it is all that it is subject to. Look at the covenant here, which is, that the party who takes from the original lessor shall not underlet any portion of the ground, unless Shard's attorney should draw the leases, that is, for the purpose of ascertaining the additional ground-rent. That ground-rent was originally a fixed rent, with one-third of the improved rent. It being understood that Law would divide the land into small portions, in order to ascertain that one-third, Shard requires that all underleases should be submitted to his solicitor, to determine the terms of the assignment, and to see that the covenants were proper; and secondly, the amount of the ground-rent was to be settled by Shard's surveyor. And again, there is a proviso, that Law should not assign for a fine to any person, without special leave, and in case such was given, then Shard should have one-third of the fine. That applies to assignments of portions of the land, and not to an assignment of Law's whole interest. What is the misrepresentation? A ground-rent is stated of 86*l.* 14*s.* 2*d.* That is consistent with the fact. If it were more, it would only be a subject for compensation.

Exceptions overruled, with costs.

(8) 2 Ves. jun. 437.

(9) 1 Bing. N.C. 370; s. c. 4 Law J. Rep. (N.S.) C.P. 66.

(10) 1 Russ. 283; s. c. 1 Law J. Rep. Chanc. 110.

ALDERSON, B. }
 Dec. 12, 1840. } DAVIES v. QUARTERMAN.
 Feb. 9, 1841. }

Parties—Misjoinder—Co-plaintiff having no Interest—Objection when available.

Where the interests of co-plaintiffs are conflicting, it is ground for dismissing the bill at the hearing; but the introduction of a plaintiff who has no interest on the record, if the other circumstances of the case are such as to enable the Court to make a just and complete decree, is not a valid objection at the hearing, but must be taken either by demurrer or plea, at an earlier stage of the suit.

Accordingly, A, by his will, gave all his real and personal estate, including a mortgage, to B. B, by his will, gave all money due to him on mortgage or otherwise to W, in trust for herself for life, remainder to L. After the death of W, a foreclosure suit was brought, to which L. was made a party co-plaintiff:—Held, on an objection taken at the hearing, that L. had no interest to entitle her to be a co-plaintiff in the suit; but that the objection, although it would have prevailed on demurrer, could not be taken at the hearing.

By deeds of lease and release and assignment, dated the 30th and 31st of October 1812, Benjamin Jones conveyed certain estates, as to part thereof, in fee, and as to the other part, for the residue of a term of 1,000 years, to Meredith Davies, his heirs, &c., by way of mortgage, for securing 3,100*l.* and interest.

Meredith Davies, by his will, gave all his real and personal estate, including this mortgage, to his son John Davies, beneficially, and appointed him his executor. John Davies, by his will, gave all monies due to him on mortgage, bonds, or otherwise, to his wife Mary Davies, in trust for herself for life, with remainder to Levia Davies, his daughter, and appointed his wife sole executrix. Mary Davies had since died intestate, and James Davies, one of the plaintiffs, took out administration *de bonis non*, both to Meredith Davies and John Davies. Benjamin Jones, the mortgagor, devised the equity of redemption in the mortgaged premises to John B. Jones, who, in 1828, took the benefit of the Insolvent Act, when all his estates were conveyed to his assignees, the defendants to

the present suit, Quarterman and Barnett, and Edwards, since deceased. This was a suit for a foreclosure, and the plaintiffs were James Davies, administrator *de bonis non* of Meredith and John Davies, R. J. Davies, who was the heir-at-law both of Meredith and John Davies, and Levia Davies, as beneficially interested in the mortgage-money, under the will of John Davies.

The cause coming on for hearing,—

Mr. James objected, that Levia Davies was improperly joined as a co-plaintiff, and that, for the purposes of this suit, she was a mere stranger, being merely the legatee of the executor of the mortgagee; and it did not appear whether the money would go to John Davies, because it was not shewn that all the mortgagee's debts were paid; and he contended, that this was an objection that might be taken at the hearing.

Mr. Simpkinson and Mr. Wilbraham, contra.—It is admitted, that Levia Davies has a beneficial interest, subject to the paramount claim of debts, and that Meredith Davies has been dead twenty-two years, without any debts being claimed against his estate. But this objection should have been taken before. There are two classes of cases:—first, where the plaintiffs have conflicting interests; and, secondly, where a co-plaintiff has no interest at all. In the last case, the objection must be taken by demurrer. But in a similar case, even when it was taken by demurrer, it was overruled.

Rhodes v. Warburton, 6 Sim. 617.

Raffety v. King, 1 Keen, 619; s. c. 6 Law J. Rep. (N.S.) Chanc. 87.

The King of Spain v. Machado, 4 Russ. 225; s. c. 6 Law J. Rep. Chanc. 61.

Cuff v. Platell, 4 Russ. 242; s. c. 1 Law J. Rep. Chanc. 2.

Wilkinson v. Parry, 4 Russ. 273.

Makepeace v. Haythorne, 4 Russ. 244; s. c. 5 Law J. Rep. Chanc. 147.

Lambert v. Hutchinson, 1 Beav. 277; s. c. 8 Law J. Rep. (N.S.) Chanc. 196.

Binnington v. Harwood, T. & Russ. 477.

Mr. James, in reply.—In *Sigel v. Phelps* (1), the objection was allowed at the hearing. The plaintiffs are bound to shew an interest on the record. If it were not so,

(1) 7 Sim. 239.

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the objection as to a co-plaintiff having no interest, could not be taken by demurrer.

Mr. E. Younge, for Barnett, the assignee under the Insolvent Act.

The case stood over for judgment.

Jan. 9, 1841. — *ALDERSON, B.* — This case stood over, in order that I might have an opportunity of looking at the cases, which require some examination, on this point. The facts are these:—Meredith Davies was the mortgagee in fee of certain lands mentioned in the bill, and mortgagee for a term of years of certain other lands; and the object of this suit is the foreclosure of that mortgage. He bequeathed all his real and personal estate in 1817 to his son, John Davies, his heir-at-law, whom he also made his sole executor. That bequest included the mortgage in question. John Davies, in 1819, bequeathed all money due to him on mortgage to his wife, Mary Davies, in trust for herself for life, and after her death, for Levia Davies, his daughter, (one of the plaintiffs,) and he made his wife executrix of his will. Rice Jones Davies, another of the plaintiffs, was the son and heir-at-law of John Davies. Mary Davies is dead intestate. James Davies, the first plaintiff in this suit, is the administrator *de bonis non*, both of Meredith Davies and John Davies. The question is, whether the joining Levia Davies as a plaintiff in this suit is such an objection as ought to prevent me from making the usual decree for a foreclosure, to which, but for such alleged misjoinder, the plaintiffs are undoubtedly entitled. I am satisfied, that Levia Davies and her husband are unnecessary parties, and that they must be treated as mere strangers entitled to no relief. But, then, what is to be the result? The general rule, as to parties to a suit in equity, seems to be, that all persons whose interests are materially affected by the attainment of that which is the object of the suit, must either personally or by representation be made parties thereto; for unless this be so, the Court would be deciding either imperfectly or in the absence of those whose interests would be compromised by a complete settlement of the dispute; and the rule as to plaintiffs seems to be, that those only can join as plaintiffs who have some common interest in obtaining that relief which is the object

of the suit. This rule, however, includes both those cases of misjoinder, where parties who have no interest in the suit are joined with those who have an interest; and those cases also where parties having adverse interests are made co-plaintiffs on the same record. But I think, that both the principles of equity, and the authority of decided cases, entitle me to say, that these two classes ought to be dealt with in a very different mode.

The object which a court of equity has in its rules relative to parties, is to enable itself to settle justly all the dispute, and to put an end to litigation, with respect to that which is the object of the suit. Now it is manifest, that the introduction of a mere stranger as a party into the record, cannot affect this. The matter in dispute may, it is obvious, be as completely settled, if all really interested are before the Court, in the presence as in the absence of the stranger. Nor can any future litigation arise out of the decree. But I quite agree that the introduction of a mere stranger upon the record, is by no means without its inconveniences and objections. It renders abatements of the suit more frequent, may embarrass the defendants as to the course proper for them to take, and is liable to the various objections so well and forcibly put by Mr. Russell in his argument (2) in the case of *The King of Spain v. Machado*. It is right and just, therefore, that the rule should exist, making such an introduction a misjoinder, and that the infringement of the rule should be guarded by some penalties. But in doing this, we should take care that we do not intr trench upon the main object of all equitable jurisdiction—namely, the settling the dispute between the real parties. The application of the rule should never prevent that.

On the other hand, the case of the plaintiffs having opposite and conflicting interests, either reduces the Court to the necessity of making a decree which is to be the foundation of future litigation, or introduces a new object into the suit; and one in which (the defendants having no concern in it) an erroneous judgment cannot be set right on appeal. Thus, in *Cholmondeley v. Clinton* (3), the object of that suit was, to

(2) 4 Russ. 231; s. c. 6 Law J. Rep. Chanc. 63.

(3) 4 Bligh, O.S. 133.

take from Lord Clinton an estate; but the introduction of Lord Cholmondeley and Mrs. Damer, as co-plaintiffs, involved a new question, whether the heir or the devisee were entitled to have it. In that question, Lord Clinton, the defendant, had no interest at all; and either, therefore, the Court must determine that he had no title to hold, without determining to whom he was to give it up, and with a suit then to be commenced between the plaintiffs to determine that question, or they must go on to determine the dispute between the plaintiffs; and as they could compel the defendant to appeal, it might occur, that after another long course of litigation, which would require new and conflicting statements, and the introduction of fresh evidence, the Court might after all make an erroneous decision between the co-plaintiffs, for which there would be no remedy. The Court, therefore, in such a case, is not able to make a decree at the hearing, which can settle the dispute justly between the conflicting parties; it ought, therefore, to decline making any decree, and to dismiss the bill, in accordance with the general principles on which it is accustomed to act.

The cases seem to me to follow these distinctions, and to establish that where the interests of co-plaintiffs are conflicting, it is a ground for dismissing the bill at the hearing; but that when a plaintiff having no interest at all, is introduced on the record, and the other circumstances of the case are such as to enable the Court to make a just and complete decree, such an objection is not a valid one at the hearing, but must be taken either by demurrer or plea, at the earlier stages of the suit. Let us examine them with this view. The early dicta which are to be found in the books, are those cited by Mr. Russell, in his argument, in *The King of Spain v. Machado*. They only shew that Lord Chancellor Parker, in 1719, held, that the joinder of an immaterial plaintiff was a ground of demurrer, and that the same point was suggested as clear law, in *Troughton v. Getley* (4), before Lord Northampton.

The decisions, however, certainly go this length, for the same point was expressly ruled by Sir John Leach, in *Cuff*

(4) 1 Dick. 382.

v. Platel, and in *The King of Spain v. Machado*, by Lord Lyndhurst, upon demurrer to the plaintiff's bill, in *Haythorne v. Makepeace*, by Sir John Leach, where the point was raised by plea; and in *Glyn v. Soares* (5), by Lord Cottenham, on demurrer.

The case of *Cholmondeley v. Clinton* is one where the co-plaintiffs had conflicting interests, which they vainly endeavoured to reconcile by an illegal agreement, which was incapable of binding either themselves or their descendants. This is no doubt a good objection at the hearing. *Sigel v. Phelps*, and the class of cases similar to it, may be considered either as cases of conflicting interests, or (which I think is the better explanation of them,) they really turn upon this—that a suit by husband and wife is, in truth, a suit conducted by the husband alone, and that, consequently, a decree made without the full hearing of the wife herself, in a matter in which she ought to be heard on her own behalf, (as for instance, the taking of an account,) could not bind her separate interest at all. The objection is, in truth, the absence of a material party, the wife, and not the joinder of an immaterial one, the husband; and this objection is one which may be proper for the hearing of the cause. I say, “may be proper,” for Lord Langdale, in *Wake v. Parker* (6), points out several cases, in which it is obvious he would hesitate in allowing it, and in those observations I do most fully concur. The case of *Rhodes v. Warburton* was also cited in the argument: perhaps it might require some further consideration, if this question depended upon its authority; but it clearly shews the inclination of the Court against such objections, even where they were taken on demurrer. For there the joinder of the legatees who were before the Court, by their representatives, the executors, was held not even a good ground of demurrer, though it was suggested, that by allowing that course, the Court prevented the examination of any of those legatees as witnesses for the defendant. There was also another case referred

(5) 3 Myl. & K. 450; s. c. 4 Law J. Rep. (N.S.) Chanc. 250.

(6) 2 Keen, 63; s. c. 7 Law J. Rep. (N.S.) Chanc. 93.

to, said to have been decided by the Lords Commissioners—*Lennard v. Fife* (7); but I have not been able to find any full report of that case.

The next case is that of *Hunter v. Richardson* (8), before Sir John Leach. The report is very short, and not very accurate. But there, although at the hearing Sir John Leach dismissed the bill, one of the plaintiffs being entitled on the facts reported by the Master to no relief, yet it would seem, that in that case there was the additional reason, that no proper decree could then be made on the facts found; for though one plaintiff was entitled to have the money paid into court, yet the defendant in that case would be entitled to receive the monies back from the other plaintiff, and there might be also a question between those plaintiffs *inter se*, consistently with the facts found by the Master. That case is not, therefore, any authority for the present question. Nor is *Bill v. Cureton* (9) any authority. That was the case of adverse or rather of alternative interests. If the one plaintiff had a title to relief, it was because the other had not. It is true, the dictum of Lord Cottenham is more generally expressed, but all dicta should be construed according to the circumstances of the case in which they are found. With the most unfeigned reverence, therefore, for Lord Cottenham's authority, I cannot act upon even his extra-judicial dictum, in opposition to decided cases, in which the very point was necessarily before the Court.

I proceed to advert to those cases. The first of them is *Wilkinson v. Parry*, in which the very distinction on which I now propose to act, seems to have been taken by Sir John Leach. For there, the objection as to the misjoinder of a stranger, was overruled by him at the hearing, upon the ground that there was nothing in the mere joinder of persons, entitled, to no relief upon the record, which precluded the Court, in a case where, notwithstanding they were still able to do complete justice, from making a decree, as to all the parties really entitled to relief; and he added,

(7) Not reported.

(8) 6 Mad. 89.

(9) 2 Myl. & K. 512; s. c. 4 Law J. Rep. (n.s.) Chanc. 98.

that the case was very different from that of allowing a demurrer under such circumstances. And this decision of Sir J. Leach, is in exact accordance with the opinion expressed by Lord Langdale in *Raffety v. King* and *Lambert v. Hutchinson*. Indeed, the case of *Morley v. Lord Hawke* (10), before Sir W. Grant, shews the efforts which the Court will make to carry into effect at the hearing, that which I have before called the general principle on which they proceed. Upon the whole then, as there is nothing on this record to prevent the Court from making a complete decree justly as to the object of this suit, inasmuch as all the persons really interested in contesting the question are before the Court, I think that I ought to make the decree, looking as a court of equity ought always to do to the substance, and not to the form, when a case is arrived at the hearing. I agree, however, that it is very convenient that the case should be brought by orderly steps to this ultimate stage, and, therefore, I am clearly of opinion, that such an objection is to be allowed at the earlier stages of a cause, but I think that the only objection which can or ought to avail a defendant at the hearing, must be one which shews that either from the absence of parties, or from the misjoinder of parties, no decree as to the matter which is the object of the suit, can be made on the evidence before the Court, which will, with justice to all the parties to the suit, finally put an end to litigation, in respect of it, between them;—with justice, I say, because that cannot be, if the course pursued deprives any of them of the right to that appeal which the law has provided for them. I am quite satisfied, however, that the decree in this case proposed, will have that effect. I will only add, that looking to the different proceedings in this case, I do not perceive that any of them has been rendered necessary *solely* in consequence of this misjoinder. If there had been any such proceeding, I should have deemed it just to the defendants to have given them the benefit of it by a special direction as to costs.

Judgment accordingly for the usual decree of foreclosure.

(10) 2 You. & Jer. 520, (cited).

ALDERSON, B. }
 July 3, 14, 1840. } CHESLYN v. DALBY.

Account—Statute of Limitations—Recitals in a Deed—Evidence.

A deed was executed by C. and D, reciting that C. was indebted to D. in various sums, but that the precise balance was not yet ascertained, and that C. was willing to pay to D. the balance that might be due to him, "such balance to be ascertained and paid in manner hereinafter mentioned." It then provided for submitting the accounts to arbitrators named in the deed. The arbitrators died before they made their award:—Held, that this constituted an absolute promise to pay the amount due; and, therefore, notwithstanding that clause, these recitals, coupled with extrinsic parol evidence as to the amount, were sufficient to take the case out of the operation of the Statute of Limitations.

This is a question of fact to be determined upon an examination of the whole instrument.

Between the years 1797 and 1818, the plaintiff, R. Cheslyn, became indebted to T. Dalby, in a considerable sum of money, partly for advances and partly for professional services of T. Dalby, as his solicitor. In March 1830, the plaintiff, being in difficulties, applied to T. Dalby to procure him a loan of money. T. Dalby then prevailed upon the plaintiff's trustees, John Dalby and W. Dawson, to advance to him 7,000*l.* by way of mortgage, out of the trust monies, T. Dalby depositing title-deeds of his own, with the trustees, as an additional security. This advance was to be made upon the express stipulation, that the accounts between T. Dalby and the plaintiff, from the year 1797, should be adjusted, and that the plaintiff should execute a security sufficient to cover the advance, and also the probable sum that might be found due to T. Dalby. An account of all demands was to be sent in by T. Dalby to the plaintiff, which, if objected to, was to be submitted to two arbitrators, with power to choose an umpire, and the security was to be confined to the balance so settled. Arbitrators were appointed, and mortgage deeds, dated in April 1830, were executed by the plaintiff for 12,000*l.*, and a receipt indorsed on the deeds for that sum. By indentures of even date, made between

the plaintiff of the first part, T. Dalby of the second part, the trustees of the third part, reciting the above indentures, and that the plaintiff was indebted to T. Dalby in various sums lent and advanced at various times, commencing in 1797, and for interest thereon, to the present time, and also for divers professional bills for business done by the said T. Dalby, as solicitor of the plaintiff, or on his account, the amount of which loans and bills was not yet ascertained, and a balance not yet struck; and further reciting, that the plaintiff was willing to pay the said T. Dalby the amount which might appear to be due to him upon the said account, commencing in the year aforesaid, *such amount to be ascertained and paid as hereinafter mentioned*; and further reciting, that upon the treaty for the 12,000*l.* it was contemplated, that T. Dalby should have been made a party to the release, and that the amount found due to him upon the accounts should have been paid to him upon the execution thereof, but that inasmuch as the balance had not been yet ascertained, it had been agreed, that 5,000*l.*, part of the 12,000*l.*, should be retained by the trustees, for the purpose of satisfying his demand, and that the surplus should be paid to the plaintiff; it was witnessed, that the plaintiff, in pursuance, &c., covenanted with the said T. Dalby, that he (the plaintiff) would within fourteen days after T. Dalby should have given in his accounts, which accounts T. Dalby covenanted to give in within two months from the date thereof, either express his willingness to admit the same, or otherwise express his intention of submitting the same to arbitration as thereafter mentioned. Then followed a mutual covenant between the plaintiff and T. Dalby to submit, if required, the accounts to the arbitration of two persons named in the deed, who, before they proceeded, were to choose an umpire; the arbitration to be made within two months after the accounts were submitted, and to be final. It was then agreed, that the arbitrators should begin their investigation from 1797, and that the lapse of time should not prejudice the claims of T. Dalby; and the trustees were empowered out of the 5,000*l.* retained in their hands to pay to T. Dalby what should be found due, the surplus, if any, to be

paid to the plaintiff. The trustees then covenanted to stand possessed of the 5,000*l.* upon the above trusts.

T. Dalby having given in his accounts within the time limited, they were referred to the arbitrators named, who being unable to agree, referred the matters in difference to their umpire, F. C., who died before any other proceedings were taken. In April 1831, the trustees having called in the mortgage money, the plaintiff offered to pay only the 7,000*l.*, with the interest thereon, denying the right of the trustees to retain the mortgage as a security for T. Dalby's balance; because the reference, by the deaths of parties, had become impossible. The trustees refusing to accept this offer, on the ground, that they had received notice from T. Dalby to that effect, the plaintiff filed his bill for an account, and that upon payment of the 7,000*l.* and interest, the trustees might be decreed to reconvey, &c. A decree was made on the 28th of June 1836, referring it to the Master to find the amount of what was due to the defendant T. Dalby, within six years before the execution of the deed, and also to find what was due before that time; the plaintiff, on the one hand, not to be precluded from the benefit of proof of payment, or of satisfaction to be inferred by the Master from length of time; and the defendant, on the other hand, not to be precluded from setting up the deed as an answer to the Statute of Limitations. The Master certified that he found, in April 1830, due from the plaintiff to T. Dalby, 4,875*l.*, in which was included interest, &c., the particulars of which sum were set forth in the schedule to his report. The first item in the schedule commenced with April 1797, and was followed by others in various years to 1820. Exceptions were taken to the report, and the question now was, whether the Master was right in holding, that the recitals in the deed of the 22nd of April 1830, took these items out of the effect of the Statute of Limitations.

Mr. Girdlestone and *Mr. L. Wigram*, for the plaintiff.—These items are barred by the statute.

Kennett v. Milbank, 8 Bing. 38; s. c. 1 Law J. Rep. (n.s.) C.P. 8.

Morrell v. Frith, 3 Mee. & Wels. 402; s. c. 7 Law J. Rep. (n.s.) Exch. 172.

Whippy v. Hillary, 3 B. & Ad. 399; s. c. 1 Law J. Rep. (n.s.) K.B. 178.

Williams v. Griffiths, 2 Cr. M. & R. 45; s. c. 4 Law J. Rep. (n.s.) Exch. 129.

This is not a general promise to pay the debt, but *conditional*, that is, to pay what the arbitrators shall ascertain, &c.; and, therefore, does not come within the doctrine of

Bird v. Gammon, 3 Bing. N.C. 883; s. c. 6 Law J. Rep. (n.s.) C.P. 258; and *Lechmere v. Fletcher*, 1 Cr. & M. 623; s. c. 2 Law J. Rep. (n.s.) Exch. 219.

The law as to conditional promises is laid down in—

Tanner v. Smart, 6 B. & C. 603; s. c. 5 Law J. Rep. K.B. 218.

A'Court v. Cross, 3 Bing. 329; s. c. 4 Law J. Rep. C.P. 79.

Haydon v. Williams, 7 Bing. 163; s. c. 9 Law J. Rep. C.P. 16.

Mr. Simpkinson and *Mr. Bethell*, for the defendant T. Dalby, contended, that the recitals contained an express acknowledgment of the debt, and an express promise to pay the amount when ascertained; and came within the doctrine of *Lechmere v. Fletcher* and *Bird v. Gammon*.

July 14, 1840.—ALDERSON, B.—In this case, the parties have argued before me as a preliminary point, the question, whether the Master has done right, upon taking this account, in determining, that notwithstanding the lapse of time, the case did not fall under the operation of the Statute of Limitations. This is a convenient course, and as the question is one of some interest, I took time to deliberate; although at the time of the argument, I thought that the law, as settled by late decisions, would ultimately be found to have concluded this point.

When this case was heard at first, it had not occurred to me to consider, whether the recitals in the deed of the 22nd of April 1830, were of themselves sufficient to take the case out of the statute; and the only point to which my attention was then drawn, was, whether I should send this question of accounts to the Master, with a direction for him to decide it, as the arbitrators would have done, in conformity with the express stipulation contained in

the body of the deed; and I then thought, and still think, that such stipulation could not be so extended; for that it was not unreasonable to suppose, that in agreeing to that stipulation, Mr. Cheslyn might have been influenced by the nature of the tribunal selected by his own assent, to try the question between him and Mr. Dalby.

At a subsequent period, in settling the minutes, my attention was drawn to the recitals in the deed, and I then directed the decree to be so framed as to leave open to each party the question which has now been discussed. At that time, my impression was founded on the case of *Kennett v. Milbank*, that these recitals could not be coupled with extrinsic parol evidence, and so be made sufficient to bring the case within Lord Tenterden's Act; and I confess that even now, but for the subsequent authorities, which have, I think, concluded the matter, I should entertain a strong doubt upon this subject. But after the case of *Bird v. Gammon*, which proceeded upon the authority of *Lechmere v. Fletcher*, I apprehend that it must be considered as fully established, that a general promise in writing to pay, not specifying any amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations.

It was said by Mr. Wigram, in argument, and I think, with great force, that this must have some limit, and that where the writing itself expresses that the debt is not ascertained, such debt cannot by other evidence be taken out of the operation of the statute. Unfortunately, however, this very point has been decided otherwise. Mr. Baron Bayley, in *Lechmere v. Fletcher*, puts this very case, "Suppose," says he, "a debt of very considerable standing, and the defendant to write thus, 'I do not know the amount, as we have had no settlement, none, however has been paid, but if you will ascertain what the amount is, I will pay you.'" And he then adds, "such an acknowledgment would be sufficient." Now, that is this very case: if, here, the acknowledgment be an absolute one; or if, being a conditional one, it appears to have become absolute by the condition having been performed. For in truth there is no legal difference between these two cases. Those authorities, such

as *Tanner v. Smart*, and the like, where the parties succeeded, because the acknowledgments were held to be conditional, turn upon the form of the promise contained in the declaration—viz. an absolute promise, which is not established by proof of a conditional one; and whether the effect of the acknowledgment within six years, be to establish a new promise, or to continue the old one, is, in such cases as these, immaterial. In the one view of the law, there is a variance between the declaration and the new promise proved—in the other, the proof itself does not in fact establish a continuation of the promise originally made.

This being the state of the law, it becomes necessary in order to apply it to the circumstances of this case, for the Court to examine the provisions of the deed, and to ascertain whether the promise to pay contained in it, was absolute at first, or, if conditional, whether the condition has been performed, and it is now absolute. On the fullest examination I can give to this deed, I have arrived at the conclusion, that this was an absolute promise. Indeed, that was the view which, in my original judgment, I took of this case. It seemed then to me, and I still retain that opinion, that this deed contains an absolute admission of there being a debt due, for the re-payment of which 5,000*l.* is to be reserved, and an agreement to ascertain that debt in a particular way. I do not think that the one was conditional upon the other.

The recitals are these:—"Whereas Richard Cheslyn is indebted to the said T. Dalby, in various sums lent and advanced at various times, commencing in 1797, and for interest thereon to the present time; and also for divers professional bills for business done by the said T. Dalby, as the solicitor and attorney of the said Richard Cheslyn, or on his account, the amount of which loans and bills is not yet ascertained, and a balance not yet struck." Now, this is a clear and absolute acknowledgment of the existence of a debt, of which the exact amount alone is not yet ascertained; and from this unqualified admission, the law would raise a promise to pay it—unless there be something added thereto by the party making the admission, which shews, that either he does not mean to promise at

all, or to promise upon certain conditions to pay the debt. The next recital in the deed is, therefore, to be looked at. It is this, "And whereas Richard Cheslyn is willing to pay the said T. Dalby the amount which may appear to be due to the said T. Dalby, upon the said account, commencing in the year aforesaid, such amount to be ascertained and paid as hereinafter mentioned." Now it is argued, that these last words form a condition to the promise to pay. But these words do not necessarily mean to import a condition; they may well be equivalent to these words, "and that such amount shall be ascertained and paid as hereinafter mentioned." And on looking at the whole deed, which, treating this as a question of fact, (to be determined at Nisi Prius, as was done in *Bird v. Gammon*, upon an examination of the whole instrument,) I am bound to do, I think the true meaning of this recital is so; that it imports that the plaintiff is willing to pay the amount, and that further, he agrees to ascertain that amount in a particular mode to be thereinafter specified; and each of these stipulations seems to me independent of the other; for the deed proceeds to recite an expectation that the amount would have been probably ascertained and paid at the time of execution, and an intention of making T. Dalby a party to the deed, thereby to testify his receipt of the balance; and then recites, that delays having prevented the ascertainment of the balance, previous to the execution of the deed, the parties had, as a substitute for such payment, arranged that the mortgagees should retain a specific sum of 5,000*l.*, and should become trustees for T. Dalby, for so much of that sum as should be equal to the true amount, when ascertained and found due to him; and should, after making that deduction, pay over the residue of the 5,000*l.* so retained to R. Cheslyn himself.

All these provisions are inconsistent with a mere acknowledgment and conditional promise to pay what shall be ascertained to be due; but they well agree with the notion, that R. Cheslyn absolutely admitted the existence of some debt upon accounts commencing in 1797, and promised to pay whatever sum should be found to be its true amount; and that he further agreed, for the mutual advantage of both Dalby

and himself, who had each a claim upon the sum so reserved, that their respective shares of it should be promptly and amicably adjusted by arbitrators.

On the whole, therefore, I think, that this was an absolute promise to pay the amount when ascertained, and if so, it falls within the cases of *Lechmere v. Fletcher* and *Bird v. Gammon*. The Master, therefore, was right in allowing the items in this account, at least so far as the present objection applies to them.

C.B. }
April 17. } PRICE v. HARTLEY.

Parties—Partners—Demurrer—Feme Covert—Fraud.

A feme covert, stated to be a partner, is not a necessary party as defendant to a bill respecting the partnership, unless the bill suggests that she had the authority of her husband.

Where fraud is charged, the particular facts must be stated, on which that charge is grounded.

The facts, as stated by the bill, were these:—In August 1839, Hartley applied to the plaintiff to become a co-guarantee with one J. Lowe, for the purpose of indemnifying Mrs. Chippendale, in respect of 200*l.*, which she had agreed to deposit in the hands of Widney, a brewer, as a security for Hartley's good conduct, in the management of a public-house, which he was to hold of Widney, as tenant-at-will, and as the servant of Widney, and of which he was to be put into possession as soon as the 200*l.* was deposited. Shortly afterwards, the plaintiff received a letter from one Shaw, the agent of Hartley, requesting to know if he would consent to become such security, and mentioning that the house was to be taken by Hartley and another person. The plaintiff by word of mouth consented to Shaw, and on the 21st of August, Hartley brought to him the following writing:—

"London, August 1839.

"To Mrs. Chippendale.

"Madam,—In consideration of your depositing the sum of 200*l.* in the hands of Mr. Widney, to answer the demand which

he may hereafter have against Mr. Hartley, on account of the Royal Oak, &c., we each of us equally, for his own share alone, and not for the share of the other, agree to indemnify you against any loss you may sustain from so depositing the 200*l.* with Mr. Widney, through any conduct of Mr. Hartley; it being however understood, that our liability extends to the amount of two-thirds only of any loss which may arise in the ordinary course of business, as Mr. Hartley has entered into partnership with Mrs. Pennington, who is liable to the other third of such loss."

Signed, "James Lowe."

The plaintiff, though surprised at the introduction of Mrs. Pennington's name, whom he afterwards learnt was the wife of Mr. Pennington, a paralytic person, nevertheless signed the letter. The plaintiff, in September following, called on Hartley for an explanation, and was informed by him, that he was to have the *sole management* of the business, and that Mr. Pennington was only to participate in one-third of the profits. On the 18th of September, the plaintiff was informed for the first time, that Mrs. Pennington and Chippendale had gone to reside with Hartley, at the Royal Oak, and, after that time, the plaintiff received various letters from Hartley, stating that the business was very successful. The bill then charged, that these letters were concocted by Hartley and the other defendants, (other than James Lowe,) for the purpose of fraudulently imposing on the plaintiff;—that on the 1st of February 1840, Widney caused the said defendants to quit the Royal Oak, in consequence of their disorderly conduct, and detained out of the 200*l.* so deposited, 144*l.* 18*s.* 4*d.*, as the amount of his loss occasioned by the defendants, (other than James Lowe);—that on the 7th of February 1840, James Lowe for the first time received information of the improper manner in which the business was conducted; and on the 13th of May, an action was brought by Mrs. Chippendale, against J. Lowe, on his guarantie, for 48*l.* 6*s.* 1*d.*, being one-third of the 144*l.* 18*s.* 4*d.*, retained by Widney, and a verdict was found against him for that amount; that on the 3rd of December, a similar action was brought by Mrs. Chippendale against the plaintiff, for

the like amount; and that the plaintiff, on further inquiry, had discovered, that the defendants (other than James Lowe) had *previous* to the plaintiff's signing the said guarantie, fraudulently concocted a scheme among themselves, to induce the plaintiff so to become bound—viz. to benefit themselves at the plaintiff's expense, and to enable them to carry on certain disorderly practices, contrary to the stipulations made with the plaintiff previous to his signing the guarantie; that there existed also another agreement between the defendants, by which Mrs. Chippendale was also to be a partner in the business, and that such agreement was entered into *previous* to the guarantie, though concealed from the plaintiff.

The bill then prayed, that the guarantie might be declared void against the plaintiff, and be delivered up to be cancelled, and that Mrs. Chippendale might be restrained from prosecuting her said action, and *for further relief*. Process was prayed against Hartley, J. Lowe (the co-guarantor), Mrs. Chippendale, and Mr. and Mrs. Pennington. A demurrer was put in by Mr. and Mrs. Pennington, on the ground, that the bill prayed no relief against them, and that no case was made by the bill for any discovery from them, or either of them, or for any relief against them, or either of them.

Mr. D. James, for the demurrer.—A bill that prays no specific relief, is only a bill of discovery, and if it goes on to pray process, it is demurrable. The bill charges, that Mrs. Pennington conspired with Chippendale and Hartley to obtain the guarantie; but the whole relief prayed is, that the instrument may be delivered up; and it is then asked, that the defendants may not only answer, but abide such further order, &c.

Angell v. Westcombe, 6 Sim. 30.

Ambury v. Jones, 1 You. 199.

[LORD ABINGER, C.B.—Mrs. Pennington is only a witness to the conspiracy. If she put in her answer, it could not be read against the defendants.]

Mr. and Mrs. Pennington have no interest in the question, and where parties have no interest, and may be examined as witnesses, the bill is demurrable. Again, the bill shews no fraud. There is nothing

stated against Mr. Pennington, and the guarantie did not at all respect Mrs. Pennington. If Mrs. Chippendale was a partner, that would be matter of defence at law. There is no question involving accounts between the parties.

Mr. Steere, for the bill.—The Court could not make the decree asked in the absence of an interested party. If Mrs. Chippendale were alone made a defendant, she might demur, because the Court could not take two-thirds of the account.

LORD ABINGER, C.B.—No account is prayed. You may have a document delivered up for original fraud in its concoction; but where the matter arises *ex post facto*, then it is a case for law. In no part of the bill is it shewn, that Mr. Pennington was a party to these transactions. How can a court of equity make a husband pay the debts of his wife when he has not authorized her to contract them? It would be a sufficient answer to a demurrer by Mrs. Chippendale, on the ground, that Mrs. Pennington was a co-partner, that the bill did not suggest that her husband authorized the partnership. Where you charge fraud, particular facts must be stated, on which the charge is grounded; and it is not suggested, that Mr. or Mrs. Pennington did anything before the guarantie was signed.

Demurrer allowed, and leave to amend refused.

C.B. }
Nov. 13. } CALDECOTT v. WILLIAMS.

Evidence—Judgment at Law—Mortgage.

In 1818, *A* and *B* agreed to build a mill, at their joint expense, *A* undertaking to advance the whole sum. *B* gave him a mortgage for 400*l.*, as his moiety of the cost. The mill was afterwards sold. In 1831, *A* brought an action against *B*, on the mortgage deed, and obtained a judgment, but took no further steps. In 1837, *A* filed a bill of foreclosure, admitting that 240*l.*, part of the mortgage-money, was paid in 1824. *B*, by his answer, insisted that the whole was satisfied by the mill transaction, and gave in evidence general admissions by

the plaintiff to third persons, made before the action at law, to that effect:—Held, that the judgment was prima facie evidence of the strongest nature, that a debt was due at the time, and that it could not be impeached in equity, by evidence of conversations and general admissions on the part of the plaintiff, which might have been used as a defence to the action at law.

In the year 1818, plaintiff and defendant agreed to build a mill at their joint expense. The defendant not being ready with his share of the money, the plaintiff advanced the whole, taking a mortgage from the defendant for 400*l.*, as his moiety of the cost. After the mill was erected, the plaintiff and defendant carried on business in partnership as millers, for a short time, but eventually the mill was sold. The exact application of the proceeds did not appear. In 1831, the plaintiff brought his action upon the mortgage bond, and obtained judgment for the amount, but never took any steps to enforce the judgment. The defendant continued all the time in possession of the mortgaged premises, and of the rents and profits. In 1837, the plaintiff filed a bill of foreclosure, admitting that 250*l.*, part of the mortgage debt, was paid off in 1824. The defendant, by his answer, insisted, that the whole of the mortgage debt was satisfied by the transactions as to the mill, and gave in evidence certain general admissions made by the plaintiff to third persons, before the action at law, to that effect. A reference was directed to the Master to inquire what, if anything, was due upon the mortgage. The Master reported the sum of —*l.* to be due. To this report, the defendant took exceptions.

Mr. Girdlestone, for the exceptions, contended, that by the terms of the reference, the judgment at law was not conclusive upon the defendant, but that if, *dehors* any deed or any written acknowledgment, he could prove payment by other evidence, it would be sufficient; and that by the admissions of the plaintiff, the whole transaction was fully satisfied.

Mr. Simpson, *contra*.

LORD ABINGER, C.B.—This is a bill to foreclose a mortgage. The plaintiff ad-

mits that 250*l.* was paid in 1824. In 1831, an action was brought, and judgment given for the then balance, whatever it might be; and things remained in that state till 1837, when this bill was filed, the mortgage being nineteen years old. The vague evidence given at the hearing, being without dates and circumstances, induced me to refer it to the Master, to make a special report, to see if there were any circumstances to invalidate the judgment at law, but none such have been produced. That judgment is *prima facie* evidence, of the strongest nature, that a debt was due at the time, unless it is impeached. Suppose the defendant had filed his bill impeaching that judgment, and had adduced these conversations, which he might have produced at the trial at law, would a court of equity allow him to do so? I have never heard of such a ground of equity. If that is so, how can I treat this judgment as a nullity? From 1831, I must take the debt to be due, as there is no evidence except these conversations, which are, in fact, no evidence in answer to this case.

Exceptions overruled.

ALDERSON, B. }
Mar. 3. } PENDLEBURY v. WALKER.

Debtor and Creditor—Composition Deed—Fraud—Guarantee—Contribution—Parties.

*The business of A, who was previously indebted to a bank in 7,000*l.*, was placed in the hands of inspectors, (B, a director, and the then registered officer of the bank, being one,) by whom a further debt was contracted with the bank, of 14,000*l.* The bank then caused representations to be made to A's creditors and friends, that they were willing to join in a composition deed with the other creditors, (by which, A. was to be released from all his then existing debts,) and to advance to A. 25,000*l.* for the purpose of paying the composition, and furnishing him with capital to carry on his business, on that sum being secured by the guarantees, of one person for 5,000*l.*, and twenty others for 1,000*l.* each. The deed was executed, by which the bank appeared to be a creditor for 7,000*l.* only. The guarantees were given, and A.*

*restored to his business. A. soon afterwards became bankrupt. The bank brought an action in the name of W, their present registered officer, against C. D., on his guarantee. C. D. then filed his bill against W, and against B, as assignee of the sum to be recovered in the action, for an injunction and delivery up of the guarantee, as obtained by the fraudulent representations of the bank, acting in concert with A, alleging, that before the bank would sign the composition deed, they demanded and received securities from A's friends, for the full amount of the 7,000*l.*, and privately agreed with A, that 9,000*l.* should be deducted from the advance in respect of the 14,000*l.*; and that after paying the composition, they made such deduction unknown to the creditors and guarantors, whereby A. had not sufficient capital left for his business. Demurrer by W. and B. for want of equity, and for the absence of the other guarantors:—Held, that the transactions between A. and the bank, were a fraud on the creditors generally, and rendered the composition void, and that any creditors might come into equity to set it aside, returning the composition-money.*

Also, that that fraud raised sufficient equity in favour of C. D., to be relieved against the guarantee.

Also, that the rest of the guarantors were not necessary parties, as the terms of the guarantee did not make them co-sureties, so as to entitle one to call for contribution against the others.

The bill stated, that before the year 1838, one Taylor was in business as a cotton-spinner, and appeared to be possessed of considerable real and personal property; but being indebted in a considerable amount, he had placed his affairs in the hands of inspectors, (of whom the defendant Jackson was one,) under whose controul his business was carried on. That previous to that arrangement, Taylor kept an account with the Liverpool and Manchester District Banking Company, and was indebted thereon in the sum of 7,000*l.*, and that the inspectors, as such, were also indebted to the said company in the sum of 14,000*l.* That in October 1838, and for some years previous, Jackson was managing director and one of the public registered officers of the company. That

the bank had made frequent applications to Jackson, as such inspector, and to Taylor respectively, for the payment of these two sums of 14,000*l.* and 7,000*l.*; and that the bank being apprehensive that they should not be able to procure payment of their demand, and Jackson fearing that he should be personally called upon to pay the 14,000*l.*, a scheme was concerted between them, by which it was arranged, that it should be represented that the bank were willing to advance a sum of money sufficient not only to pay a composition of 10*s.* in the pound, on all the then existing debts of Taylor, but also to enable him to carry on his business, and that such representations were to be made, in order to induce his other creditors to accede to such composition, and his friends to join in a security for the repayment of the money so proposed to be advanced. That at a meeting of the directors of the bank, it was agreed that this scheme should be carried out. That the bank then gave out that though Taylor was embarrassed, his property was of great value, and if he could be relieved from his debts, and be restored to his property, by means of such advance, he would soon be enabled to pay off such loan. That the creditors of Taylor agreed to accept such composition, under the belief that the bank had done the same. The bank then represented that they were willing to advance to Taylor 25,000*l.*, for the purpose of paying the composition and of carrying on his trade, provided the repayment were secured by the guarantees of responsible persons, at the end of five years. That these representations were made to the plaintiff with the sanction and knowledge of the bank, and that the effect of the arrangement would be to leave Taylor in full possession of all his property, unincumbered by previous debts of any sort; and that the bank had agreed to take the guarantees of twenty-one persons, one for 5,000*l.*, and twenty for 1,000*l.* each, and the plaintiff was requested to become guarantee for 1,000*l.*, which he consented to do, in the full belief that all these representations were true in all respects. That such composition deed was executed by all the creditors of Taylor, and that therein the bank appeared to be creditors for 7,000*l.*,

and no more, and consented to receive 3,500*l.*, in full satisfaction of their claim. The forms of the guarantees were printed, and that executed by the plaintiff was as follows:—"To the Manchester, &c. Banking Company. Whereas the company have agreed, at the request of me, the undersigned W. Pendlebury, and divers other persons, and in consideration of the guarantees and agreements hereinafter entered into and mentioned, to advance unto W. G. Taylor, of &c., a large sum of money, considerably exceeding the amount intended to be hereby guaranteed, the whole of which said advance or sum is intended and agreed to be made the subject of a distinct account between the company and Taylor, separated from and independent of all other accounts and dealings between them, to be designated as Taylor's guaranteed Loan Account, No. 1. And whereas I, the undersigned, have undertaken to guarantee the payment of the sum of 1,000*l.*, part of the said advance, with interest as hereinafter mentioned, the residue thereof being guaranteed by the said several other persons, at whose request such advance has been agreed to be made as aforesaid, in such proportions and to such extent respectively, as has been stipulated between the company, and such other persons respectively, and in particular the sum of 5,000*l.*, part thereof, being guaranteed by R. Potter, of &c. And whereas it was intended or contemplated that the said banking company should have or might become entitled to the benefit of certain other securities for the repayment of the said sum so advanced by them to Taylor, as aforesaid. Now, in consideration of the said advance or loan so made to Taylor by the company, I do hereby undertake to guarantee to the proprietors, &c. of the said company, for the time being, the payment of the full sum of 1,000*l.*, part of the said advance or loan, such sum to be payable at the expiration of the term of five years, from the 20th day of October instant, with interest at 5*l.* per cent. from that date, till this guarantee shall be fully discharged and satisfied. And I declare and agree, that this my guarantee shall be held, and may be enforced by the company, in addition to, and concurrently with all or any other guarantees, securities,

whether by deed or otherwise, and whether real or personal, covenants, liens, or remedies whatsoever, which the company now do or shall hold or become entitled to, for securing the balance or sum for the time being remaining due to them in respect of their said advance to Taylor; and I further declare and agree, that no payments made by Taylor, or on his account to the company, shall, as between me and the company, be considered as made on account or in discharge or reduction of the advance so made by the company to Taylor, or of any part thereof, unless such payment shall be expressly directed by Taylor, his executors, administrators, trustees, or inspectors, respectively, in writing, to be appropriated or applied for that purpose; or unless the company shall give notice in writing to Taylor, his executors, &c., of the intention of the company to appropriate and apply such payment to the purpose aforesaid. And I further declare, &c. that all payments which shall be appropriated and applied in discharge or reduction of the said advance, shall be in the first instance applicable in discharge and reduction of that part of the said advance, (the 5,000*l.* guaranteed by Potter); and that I, in common with all the said several persons, other than Potter, by whom the said advance is guaranteed, shall only be entitled to the benefit of such appropriated payment, after Potter shall have had the benefit thereof, to the full extent of 5,000*l.*, with interest; and that I and all the several guaranteeing parties, other than Potter, shall be respectively entitled to the benefit of the said appropriated payments, in discharge or reduction of our respective guarantees *pari passu*, and in the respective proportions which the several sums guaranteed by us respectively bear to the aggregate amount of all the sums so guaranteed. Witness my hand, this 19th day of October 1838, W. Pendlebury."

The bill then stated, that similar guarantees were executed by other friends of Taylor, to the amount of 25,000*l.*, and that Taylor was thereupon ostensibly restored to the possession of all his property and effects, and thenceforth continued to carry on his business till November 1840, when he became bankrupt. The bill then

went on to state, that the plaintiff had lately discovered that the bank had refused to execute the composition deed, or advance any part of the loan till the difference between the composition-money and their debt of 7,000*l.* had been either paid or secured to them; and that thereupon the mother of Taylor gave security for 2,000*l.*, the sister for 500*l.*, and R. Nield for 1,000*l.* That the bank never did advance to Taylor the 25,000*l.*, but deducted 9,000*l.* in respect of the debt due from the inspectors, as also the composition-money; and that by reason thereof, Taylor was left without any sufficient capital to carry on his business. That thereby the creditors of Taylor were defrauded, and that as the plaintiff had been induced to sign the guarantee on the faith of the representations of the bank being *bond fide*, the consideration for the guarantee had failed, and he was entitled to be relieved against it. That Jackson had been removed from the office of public registered officer, and the defendant Samuel Walker appointed in his place. That in December 1840, the bank commenced an action against the plaintiff in the name of Walker, upon the guarantee. That Jackson, at the date of the guarantee, was and still is a shareholder in the banking company, and that he claimed to be, and was interested in the said action, and in the sum sought to be recovered, by virtue of an assignment made to him by the bank. The bill then charged, that at the time of the composition and pretended advance, the bank knew that Taylor was indebted to the inspectors in 14,000*l.*, and that 9,000*l.* was to be retained out of the advance in respect thereof, and that such sum was, in fact, retained without the knowledge or consent of any of the other creditors of Taylor, and that such fact was never communicated to the plaintiff; and that Jackson was removed from being a public registered officer, in order to deprive the plaintiff of any defence at law, or of any discovery in equity from him. The bill then prayed, that the guarantee so signed by the plaintiff, might be declared to have been obtained by fraud and misrepresentation, and to be wholly void, and that the company and Walker might be restrained from proceeding in their action against the plaintiff, or com-

mencing any fresh action. Prayer of subpoena against Walker and Jackson.

To this bill, the defendant Jackson demurred for want of equity, and also on the ground that the other shareholders were necessary parties, and in particular those against whom fraud was charged, and also the other guarantors. Walker also demurred for want of equity, and also on the ground that the other guarantors, and also the assignees of Taylor, ought to be parties.

Mr. Simpkinson, Mr. Sutton Sharpe, and Mr. J. Russell, for the demurrers.—If Jackson is sued as a shareholder, the other shareholders ought to be parties, for the demand is against the bank. But it is said, that the plaintiff is entitled to make him a party, by analogy to the cases of bills against corporations, where the late officer is made a party to obtain a discovery. But in those cases, the necessity introduced the practice, and even there it must appear that the discovery is essential, and that it cannot otherwise be had. There is no relief prayed against Jackson. The 14,000*l.* was not the debt of Taylor, but of the inspectors, and Taylor could not be restored to his business without making some arrangement with them. That was no fraud on the creditors. But it is said that the bank received the remaining 10*s.* of their debt from third persons; how can a guarantor complain of that as a fraud upon him, even if Taylor or the creditors could? If Jackson is made a party as concerned in the fraud, then the other directors ought to be here. As to the co-guarantors being parties, the distinction is rather nice. It is settled, that persons may be co-sureties, though by distinct instruments.

[ALDERSON, B.—Each person here is surety for a limited sum: what harm is done to the others?]

Suppose one pays his 1,000*l.*, and the others nothing, would he not be entitled *pro rata* to call upon them for contribution. If so, the others are necessary parties. They are in the nature of co-sureties, though by different instruments, for the payments by the principal are to be applied *pari passu*.

Dering v. Lord Winchelsea, 1 Cox, 321.

Stirling v. Forester, 3 Bligh, 575.

Copis v. Middleton, Turn. & Russ. 224;

s. c. 2 Law J. Rep. Chanc. 82.

Mayhew v. Crickett, 2 Swanst. 185.

The principle on which contribution is given, is laid down in *Craythorne v. Swinburne* (1). The liability was limited in *Dering v. Lord Winchelsea*. Suppose the whole sum paid off except 1,000*l.*, could the burthen of that be thrown upon one guarantor?

[ALDERSON, B.—The stipulation in the deed prevents that; all that is paid in, is to be applied *pari passu* in discharge, &c.]

The bank could not release one of the sureties; neither can the Court without having the others here. If, after some had signed the deed, the others had refused, the first would have been released from their engagement. As to the validity of the composition deed, the underhand bargain alleged, would be invalid itself, but it would not vitiate the composition deed, or remit the creditor to his original debt—*Eastbrook v. Scott* (2). The relief given in every case, proceeds upon the footing of the validity of the deed.

Jackman v. Mitchell, 13 Ves. 581.

Constantin v. Blache, 1 Cox, 287.

Fawcett v. Gee, 3 Anst. 910.

Cockshott v. Bennett, 2 Term Rep. 763.

The case is different, when the contract of the debtor with his creditors is left imperfect; there the Court would be passive. If the composition deed is void, the assignees ought to be before the Court. If Jackson is made a party for the fraud, costs should have been prayed against him.

Mr. Bethell and Mr. Bacon, for the bill.

—There are two grounds on which the bill can be maintained, first, that the contract was obtained from the plaintiff by fraudulent misrepresentation; secondly, that the agreement between the plaintiff, as surety, and the bank, was different from that secret contract between the bank and the debtor, and thereby the surety was discharged. As to the first point, the bank received the whole of their debt. As to the second, the surety enters into the contract on the condition, that money is advanced to Taylor to carry on his business. Now, to that very thing, the surety looked for his ultimate indemnity, and his chance

(1) 14 Ves. 160.

(2) 3 Ves. 456.

of repayment was diminished in proportion as the advance to Taylor was less. Again, if the surety had known that the resources of Taylor's friends were to be drained, to make up the 7,000*l.* to the bank, he would not have entered into the contract. In *Rees v. Berrington* (3), it is said, "There shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it"—*Blake v. White* (4).

[ALDERSON, B.—There is this difficulty: at the time of the contract, Taylor's property was in the hands of inspectors, pledged to them for 14,000*l.* If this property were redeemed by the 9,000*l.*, would not that be a transaction for Taylor's benefit?]

It is not clear from the record, that Taylor's estate was subject to that debt. The agreement was for an advance in monies numbered. As to other guarantors being parties, each guarantee is for an integral part of the 25,000*l.* The proposition is, that a surety has no right to call for contribution from another, unless he can shew that what has been paid by himself, is something to which the other surety might have been liable. That principle is found in all the cases, and constitutes it a joint and common transaction. Each has an interest in the contract of his co-surety, but the present guarantors are not co-sureties, for there is no privity between them. There is no one common subject entering into all these guarantees—*Dering v. Lord Winchelsea*. *Stirling v. Forester* is precisely the same case. As to the assignees being parties, the bill does not suggest that there are any assignees, so that this is a speaking demurrer.

Brownsword v. Edwards, 2 Ves. 245.

Canthorne v. Chalie, 2 Sim. & Stu. 129;
s. c. 3 Law J. Rep. Chanc. 125.

As to the validity of the composition deed, in *Leicester v. Rose* (5), such an agreement is said to be a fraud upon the rest of the creditors generally, therefore they would be entitled to set aside the deed. This case was approved by Lord Eldon in *Ex parte Sadler* (6). By such fraudulent acts,

the deed is void *ab initio*—*Howden v. Haigh* (7). It is analogous to the case of a bankrupt's certificate obtained by fraud, which is thereby rendered void. The creditor may, at his election, bring his bill to avoid the whole transaction, or to bring back into the common stock, what has been abstracted. See also *Knight v. Hunt* (8).

Mr. Simpkinson, in reply.—The friends of Taylor must necessarily have known that his affairs were in the hands of inspectors. *Howden v. Haigh* went farther than any previous case. If it can be supported upon principle, it is very different from the present case. All the previous cases proceed upon the ground, that the composition deed is valid. But here is no diminution of Taylor's assets, and the securities were given by third persons. A bankrupt's certificate is made void by the express words of the statute, therefore the analogy fails. The guarantors would have a right to call for contribution.

[ALDERSON, B.—Suppose only 950*l.* due from Taylor, the bank could not sue the nineteen persons for more than 50*l.* each.]

If, after a guarantor had paid 1,000*l.*, Taylor had paid into the bank 19,000*l.*, the bank could not be compelled to refund to such guarantor, but his remedy would be by contribution.

ALDERSON, B.—The bill states, that Taylor was indebted to the Liverpool and Manchester District Banking Company, in the sum of 7,000*l.*; that he had been in difficulties; that his concerns and property had been in the hands of inspectors, of whom Jackson, then the managing director of the bank, was one; that the inspectors, in carrying on the business of Taylor, had incurred a debt of 14,000*l.* to the bank; that, under these circumstances, the bank had conceived a plan in conjunction with Taylor, of inducing the creditors of Taylor to take a composition of 10*s.* in the pound, and had represented their own willingness to advance a sum of money to enable the composition to be paid, and to enable Taylor to carry on his business; that the bank were to pretend to accept the 10*s.* as well as the rest of the credi-

(3) 2 Ves. jun. 543.

(4) 1 You. & Col. 420; s. c. 4 Law J. Rep. (N.S.) Ex. Eq. 48.

(5) 4 East, 372.

(6) 15 Ves. 52.

(7) 3 Per. & Dav. 661; s. c. 9 Law J. Rep. (N.S.) Q.B. 198.

(8) 5 Bing. 432; s. c. 7 Law J. Rep. C.P. 165.

tors; that 25,000*l.* was to be advanced by them for those purposes, if guaranteed by Taylor's friends; and that these representations were made to Taylor's friends, and to the plaintiff, who, in faith thereof, guaranteed 1,000*l.*, part of the sum of 25,000*l.* What then were the circumstances on the faith of which the plaintiff acted? They were two. First, that Taylor should be freed from all his debts, except that of 25,000*l.*, by a valid composition. Second, that the residue not employed for the composition, should be paid to Taylor, to enable him to carry on his business. If the plaintiff has been deceived by the fraud of the bank in these matters, he is entitled to relief in equity, for the misrepresentation of the bank has caused him to give them this guarantee. Now, it appears that the bank have all the time, secretly from the other creditors, stipulated for the payment in full of all their debts, receiving 10*s.* under the composition, and 10*s.* by means of securities from third persons. The question is, what effect this has on the composition? Almost all the cases on this subject lay it down, that this is a fraud on the rest of the creditors, and no one doubts that the bank is not entitled to claim from the other persons who have agreed to pay it, the additional 10*s.* in such a case. These bargains, as the Court of Queen's Bench clearly lays it down, in the case of *Howden v. Haigh*, are founded on entire good faith; and that Court lays it down, that if such good faith be not observed, the whole is void. And again, in *Knight v. Hunt*, Lord Wynford says, "These compositions with creditors require the strictest good faith. If I see a man acquainted with the circumstances of the debtor, agreeing to sign a paper under which he will," &c. Now, these observations are exactly in point here. How can I say that the creditors have not been mainly induced to agree, by seeing the bank, whose managing director, Jackson, was one of the inspectors, agree to accept 10*s.* in the pound? And yet, if this were all false, as I am bound to take it to be, this would clearly be a fraud on the rest of the creditors: and if so, it seems to me, that any one of these creditors, if he was so minded, must have the right to apply to equity, to set aside

the deed of composition, restoring of course, if he so pleases to act, the composition he has received. The act, therefore, of the bank, has made the composition no longer binding on the creditors. The plaintiff's guarantee, therefore, is founded on a misrepresentation of the real intention of Taylor, and the change of circumstances is produced by the act of the bank. I think, therefore, that, unless the facts can be varied by some previous knowledge, or subsequent assent of the creditors after knowledge, or can be explained or denied altogether, the plaintiff is entitled to relief in equity. The demurrer for want of equity must therefore be overruled.

Then as to the demurrer for want of parties, it seems to me, that Jackson is properly made a party, as assignee of the debt, from the bank. He is not a proper party as a shareholder. The other defendant, under the act of parliament, properly represents all the shareholders, therefore no other shareholder need be a party. The only question is, as to the co-guarantors. But upon looking carefully at the guarantee, I have arrived at the conclusion that there is no right of contribution *inter se* amongst the co-guarantors. *Dering v. Lord Winchelsea* proceeds, I think, upon the principle stated by Mr. Bethell, which is this: where the same default of the principal renders all the co-sureties responsible; all are to contribute; and then the law adds, that which is not the principle, but the equitable mode of applying it, that they shall all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is surety. And this explains, I think, the dicta cited by the other side. But here, each party is bound for an individual sum, and there is in the instrument a mode fixed by special contract, in which the bank are to apply any payments made by the principal, in discharge of the otherwise fixed liability of each surety, viz. first, in discharge of the 5,000*l.* guarantee, and then rateably in discharge of the rest. But I think this does not make each a co-surety contributing to the others. I think, therefore, that they need not be made parties to this record. The demurrer, therefore, must be overruled.

C.B. }
Jan. 11. } PLUM v. PLUM.

Mortgage—Pleading—Allegation of Interest in a Defendant—Demurrer.

Held, on demurrer, that where a defendant is not in possession of the property in question, and the bill does not allege that he made any particular claim, it is not sufficient to assert merely that he claims "some interest" in the premises. The bill should set forth the specific interest he claims, the nature of it, and in what way it affects the plaintiff.

Nothing is admitted by demurrer but what is properly pleaded.

The father of the plaintiff, J. S. Plum, died intestate, being seised of certain real estates, subject to a mortgage, in fee. The bill prayed, that the plaintiff, as heir-at-law, might be declared entitled to redeem these estates, which were now in possession of the widow, who claimed to hold the same by virtue of a post-nuptial settlement, in which the limitations were to the wife for life, remainder to the husband for life, remainder to the children of the marriage, of whom Thomas Copland Plum was one.

The widow had since taken an assignment of the mortgage, in the name of Ellen Plum and Jane Plum, in whom the legal estate was now vested, in trust for her. The defendants were Ann Plum, (the widow,) Ellen Plum, and Jane Plum, and Thomas Copland Plum, as interested under the alleged settlement. There was no direct averment in the bill of such a settlement, or of any claim made by Thomas Copland Plum, under it, but only an allegation of a pretence thereof by the widow, as an answer to the plaintiff's application. The bill then stated, "that Ann Plum, (the widow,) confederating with Thomas Copland Plum, a defendant hereto, and *claiming to be interested* in the premises, and with divers other persons, refused to comply," &c. : and then charged that no such settlement was executed by the father.

Thomas Copland Plum demurred, on the ground, that no case was made by the bill, entitling the plaintiff to discovery or relief as against him.

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Mr. Sutton Sharpe, for the demurrer.—The bill does not aver that any such settlement was made.

[LORD ABINGER, C.B.—The bill does not even say, that Thomas Copland Plum insists on any such settlement.]

The plaintiff himself denies the existence of it. The whole equity of the case consists in the pretences and charges—*Flint v. Field* (1).

Mr. Simpkinson and Mr. Dixon, for the bill.—It is stated in the bill, that Thomas Copland Plum claims an interest; and by charging the contrary, it is not denied that he claims such interest. It is quite sufficient to assert, that a defendant has an interest.

[LORD ABINGER, C.B.—A party demurring only admits what is properly pleaded. Thomas Copland Plum may claim an interest wholly unconnected with the other parties to the suit—viz. paramount to the mortgage: if so, what right have you to join him in this bill?]

"A general charge of confederacy is usually followed up by an allegation, that the defendants pretend or set up the matter of their defence, and by a charge of the matter that may be used to avoid it. This is called the charging part of the bill, and is sometimes used to put in issue some matter which it is not for the interest of the plaintiffs to admit, for which purpose the charge of the pretence of the defendant is held to be sufficient"—*Mitford Plead.* by *Jeremy*, 43. If that settlement exists, Thomas Copland Plum must claim an interest under it, and no decree can be made while it is in existence.

LORD ABINGER, C.B.—Nothing is admitted by demurrer that is not properly pleaded. This fact is pleaded in such vague terms, that the admission is not to be considered as sustaining the matters in the bill stated. If you merely say, a man claims an interest, you must shew that he resists the right of the plaintiff, by being himself in possession, or by obstructing the plaintiff's title; and then you are not bound to set forth the particulars of his claim. But where a party is not in possession, and does not obstruct your title,

(1) 2 Anst. 543.

and there is no allegation that he ever stated that he ever claimed under that deed of settlement, it is not sufficient. If you had charged that he alleged such a deed under which he claimed, it would have done; but you only say his mother alleges, &c. You ought to have stated, that he alleges a specific interest, and also what is the nature of it, and in what way it affects you. The allegations in the bill are not definite enough to make me say, that Thomas Copland Plum is a necessary party to this bill.

Demurrer allowed.

ALDERSON, B. }
Feb. 24 & 25. } LLOYD v. DOUGLAS.

Mortgage — Multifariousness — Bill of Revivor.

A. mortgaged lands in fee to S. for 3,000l., and afterwards mortgaged the same to K. for 1,000l. Both mortgages were assigned to C, who got possession of the premises, and then filed a bill of foreclosure against A. and one Eyton, who was alleged to have some interest in the equity of redemption. A. then filed his bill against C, alleging a contract by him, previous to the transfer, to purchase part of the lands comprised in the first mortgage, and possession delivered, and praying specific performance, an account of the purchase-money, of the rents and profits received by C, and a reconveyance of the residue. Both causes coming on together, a decree was made in the first cause directing the accounts, &c.; and it was further ordered, that what was found due from C. to A. under the decree in the second cause, should be set off against what should be found due from A. to C. under this decree, and that upon payment by A. to C. of the balance, if any, C. should reconvey to A.; or upon payment by the other defendant, C. should reconvey to him. The decree in the second cause, of even date, was for specific performance, and for an account of the purchase-money, &c.; and it further directed, that what was found due from A. to C, under the first decree, should be deducted from or set off against (as the case might be) what was found due from C. to A. under this decree, and that thereupon

A. should convey. By a subsequent order, the accounts in both suits were referred to the same Master. A. and C. and Eyton dying before the report was made, the representative of A, by one bill, revived both suits against the representatives of C. and Eyton, and introduced, by way of supplement, an award made under an inclosure act of certain lands to A, as owner of the premises comprised in the first mortgage, the sale thereof by A. to P, who entered into possession, but refused to pay the purchase-money, and that P. was induced afterwards, without consideration, upon C. giving him an indemnity, to deliver up the same to C, who had ever since had possession; and praying that the plaintiff might be declared to have a lien upon the same for the purchase-money, and that it might be included in the accounts directed by the two decrees. The representatives of C. and Eyton severally demurred for multifariousness, and on the ground that P. ought to be made a party.

Semle—The bill of revivor would have been multifarious against the representatives of Eyton, even if the supplemental matter had not been introduced; but that addition made it clearly so against both defendants. Demurrers allowed on that ground:—Held, that P. was not a necessary party.

B. Lloyd being entitled, under the will of his mother, to estates in fee, in the parish of Llanasa, in the county of Flint, with a conditional limitation over to his brother J. Lloyd, of Holywell, by indentures of the 5th and 6th of June 1809, mortgaged the same in fee to Stollerforth (J. Lloyd joining in the conveyance), as a security for 3,000l.; and by deeds of the 17th of September 1812, demised the same premises to R. Kirke for 500 years, as a security for 1,000l. advanced to J. Lloyd. And by the same instrument, as a further security, J. Lloyd demised to Kirke for 500 years a capital messuage and lands, called Cefn, and a farm in the county of Salop, and assigned all his interest in a certain mine, called Holywell Level. On the 1st of August 1813, J. Lloyd further mortgaged the last-mentioned estates to Kirke as a security for 700l. In September 1817, J. Douglas obtained a transfer of the mortgage of 1809, there then being a large arrear of interest due thereon. In

1820, J. Douglas took an assignment of Kirke's mortgages. J. Lloyd, of Holywell, by his will, gave all his real estate to his wife for life, remainder to his four children, John, Robert, Richard, and Ann Lloyd. On the 12th of December 1820, J. Douglas filed his bill against B. Lloyd, and the four children of J. Lloyd, and against Thomas Eyton, alleging, as to Eyton, that he claimed some interest in the equity of redemption, praying an account of what was due on the mortgages of 1809, 1812, and 1813, and for a foreclosure. In May 1822, B. Lloyd filed his bill against J. Douglas and the four children of J. Lloyd, of H., stating articles of agreement of the 2nd of April 1817, by which B. Lloyd and J. Lloyd covenanted to convey to J. Douglas in fee, certain lands, part of those comprised in the mortgage of 1809, the price to be settled by arbitrators; and that 50*l.* was paid by J. Douglas, who was thereupon let into possession: that the arbitrators fixed the price at 3,700*l.*; and stating the transfer of 1817, and that J. Douglas, shortly after the execution of the same, entered into possession of the premises comprised in the deeds of 1809, and had since continued in possession; and that Robert Lloyd was the personal representative of J. Lloyd, of H., and of C. his widow.

The bill prayed an account of the mortgage sum of 1,000*l.*, and what had been received by J. Douglas in respect thereof; and that J. Douglas might specifically perform the articles of agreement; and for an account of the 3,000*l.* mortgage debt, and the interest, and of the 3,700*l.*, the amount of such purchase-money; and of the rents, &c. received by J. Douglas, of such parts of the premises comprised in the deeds of 1809, as were not comprised in the articles of agreement, and for an account of the profits of the mine, and that J. Douglas might be decreed to pay to B. Lloyd what was found due, and to convey to him all the premises comprised in the deeds of 1809, which were not comprised in the articles of agreement. These two causes came on to be heard on the same day.

The decree made in the first cause, dated the 17th of July 1827, after referring it to the Master to take the accounts of the

different mortgages, and giving directions as to the application of the rents, further directed that what should be found due from J. Douglas to B. Lloyd, under the decree made in the second cause, and of the same date, should be applied in payment of what should be found due for principal, interest, and costs, in respect of the mortgages of June 1809 and September 1812, and in case, after such application, anything should still remain due, then upon payment thereof by B. Lloyd to J. Douglas, J. Douglas was to convey to B. Lloyd the premises comprised in the deeds of June 1809, and first comprised in the deeds of September 1812, as also, (if any sum of money should be found due in respect of the 1,000*l.* secured by the said last-mentioned mortgage,) the said mine, &c., and deliver up title-deeds, &c., or upon such payment being made by the other defendants, J. Douglas was to convey the said premises to them, or such of them by whom such payment should be made; and in case of default, defendants to be foreclosed.

By a decree made in the second cause, and of the same date, it was ordered, that the articles of agreement should be specifically performed by J. Douglas, and it was referred to R. R., one of the Masters, &c., to take an account of what was due from J. Douglas to B. Lloyd, in respect of the purchase-money of the premises comprised in the said articles, and interest thereon; and that such sum of money as should be found due from B. Lloyd to J. Douglas, under the decree made in the first cause, if of less amount, should be deducted from, and if of greater amount, then as to a sufficient portion, should be set off against what should be found due from J. Douglas to B. Lloyd, in respect of the said purchase-money and interest; and that J. Douglas should pay to B. Lloyd the amount so found due in respect of the purchase-money and interest, and the balance thereof, after such deduction as aforesaid, in case any sum of money should be found due from B. Lloyd to J. Douglas under the said decree, and should be less in amount than what should be found due from J. Douglas to B. Lloyd, in respect of the purchase-money and interest; and that after such payment, or if

the sum of money found due from B. Lloyd to J. Douglas, under the said decree, should be of greater amount than what was found due from J. Douglas to B. Lloyd, in respect of such purchase-money and interest, that upon setting off a sufficient portion of the sum of money so found due to J. Douglas, against the purchase-money and interest found due to B. Lloyd, B. Lloyd should execute a proper conveyance to J. Douglas of the premises comprised in the articles of agreement.

After some proceedings had been taken under the said decrees, by an order of the 2nd of June 1837, it was referred to J. S., the Master to whom the first cause stood referred, to retake the accounts already taken by him under the first decree, and also to retake the accounts in the second cause, which was thereby transferred to him for that purpose.

J. Douglas and B. Lloyd both died after the date of that order, and before any report was made. B. Lloyd, by his will, gave all his estates in Llanasa, subject to certain charges and annuities, to Robert Lloyd (the plaintiff), for life, with remainders over, in strict settlement to the other sons of J. Lloyd, of H., and appointed Robert Lloyd his executor. John Douglas, by his will, gave all his real estates to his son J. H. Douglas, and appointed his wife, Ann Douglas, his executrix.

Thomas Eyton, a defendant in the first suit, died in May 1837, intestate, and administration was granted to Robert Eyton, his son.

Robert Lloyd then filed his bill to revive both these suits, to which the defendant pleaded, that the administratrix of J. Douglas was a necessary party.

The plaintiff then amended his bill, making Ann Douglas a party, and introduced the following statement by way of supplement: that in 1814, the commissioners, under the 51 Geo. 3, being an act for inclosing waste lands in the parish of Llanasa, in the county of Flint, allotted to B. Lloyd certain parcels of land, being part of the common in the said parish, in respect of his rights of common, as the freeholder in possession of the tenements comprised in the deeds of June 1809; that on the 24th of June 1814, part of the lands so allotted, viz. fourteen

acres, was put up to sale by B. Lloyd, and purchased by J. D. Pugh for 470*l.*, and a deposit of 10*l.* per cent. paid by Pugh, according to the conditions of sale, and a written memorandum was signed by Pugh and the agent of the vendor; that in September 1814, Pugh, with the permission of B. Lloyd, took possession, and continued in possession for some years, but refused to complete the purchase, alleging that B. Lloyd could not make a good title, but Pugh paid interest on the balance of the purchase-money; that in 1817, J. Douglas, having obtained a transfer of the mortgage of 1809, brought an ejectment against B. Lloyd, and got possession of the premises comprised in that mortgage, and afterwards entered into some agreement with Pugh, by which Pugh, in 1826, delivered up to him the said allotments, without any consideration; and that J. Douglas had indemnified Pugh from all liability in respect of his agreement with B. Lloyd; that the balance of the purchase-money was never paid; and that B. Lloyd, in consequence of the accounts pending between him and J. Douglas, was unable to enforce his lien on the land so sold; that since 1826, J. Douglas and J. H. Douglas had been in possession of the rents, &c. of the said allotments, without paying either the principal money or interest. The bill then charged, amongst other things, that the said allotments, and all charges and liens thereon, though not specifically named in the two decrees of the 17th of July 1827, were nevertheless virtually included in those decrees, and in the subsequent orders; that the legal estate in the same was now vested in J. H. Douglas; and that the defendant Robert Eyton claimed some interest in all the matters before referred to.

The bill prayed, that the two suits might be revived, and that the plaintiff might have the benefit of the several proceedings therein, and might be at liberty to prosecute the same, and, in particular, the order of the 2nd of June 1837; and that in proceeding under that order, the Master might be directed to take an account of the unpaid balance of the purchase-money, 470*l.*, and the interest, from the time that J. Douglas took possession of the said allotments; and that the amount of such balance and

interest might (without prejudice to the mortgage of the 9th of June 1809) be declared a lien on the said allotments, and be raised by sale thereof, and paid to plaintiff; and that the amount owing from the estate of J. Douglas, in respect of the other matters referred to by the decrees of the 17th of July 1827, might be ascertained and paid, &c.

To this bill the defendants, J. H. Douglas and Robert Eyton, put in two separate demurrers, on the ground that the bill was multifarious, and that Pugh was a necessary party.

Mr. Simpkinson and Mr. J. Russell, for the demurrer.—The two suits are perfectly distinct in their objects; Eyton, in particular, had nothing to do with the second suit. They cannot, therefore, be revived by one bill. But besides that, the amended bill introduces the subject of the allotment and the sale to Pugh, and seeks in addition a *quasi* specific performance against Douglas. The legal title in these fourteen acres passed to B. Lloyd, to whom the commissioners allotted them, and not to Douglas. How far they were subject to the mortgage is another question. Douglas was not a purchaser of these premises.

[*ALDERSON, B.*—Douglas means to assert that they form part of the mortgaged premises.]

The decree in the first suit was not a common decree of foreclosure. The two suits came on the same day, and as between B. Lloyd and J. Douglas they involved accounts, which might be set off one against the other. A separate decree was pronounced in each; therefore they were not cause and cross cause. Does the order, referring them to the same Master, make any difference? The suits were not consolidated thereby. The bill merely charges that Eyton claims *some* interest in all the subject matters of the suit. That is not sufficient—*Plum v. Plum* (1); the particular interest must be stated. But according to the bill, Pugh is a necessary party.

[*ALDERSON, B.*—In what way do you distinguish the demurrers of Eyton and Douglas?]

Douglas is more or less concerned in

all the matters, however unconnected they may be, and is a party in both causes. Eyton is only a party in one cause. Besides, the order of June 1837 was made after the death of Thomas Eyton, which took place in the May previous. If it is sought to enforce the contract with Pugh, he should be a party. If Douglas is stated to be in possession as mortgagee, an account should have been prayed of rents and profits. Even if the first bill of revivor were correct, this additional charge, as to Pugh's contract, makes it multifarious. The Court, in such a case, will not give leave to amend—*Tyler v. Bell* (2). The right to prosecute the two decrees is different. The one decree gives costs of suit, the other leaves that question open. These two decrees cannot be mixed up in one proceeding.

Mr. Girdlestone and Mr. Shadwell, for the bill.—The argument against the bill has been for some supposed want of equity, and not for multifariousness. Considering the nature of the decrees, there will be no difficulty in maintaining this bill. To the first bill Eyton put in no demurrer, but was a party to the decree, which directed, that upon payment by B. Lloyd, J. Douglas should convey to him; or that upon payment by the other defendants, J. Douglas should convey to them. Here B. Lloyd and Eyton were recognized as entitled to redeem; that is quite sufficient to shew that both had an interest under the decree; and therefore their representatives have an interest in any suit to revive that decree, and are necessary parties. Then as to the other decree. The bill alleges that they were cause and cross cause. The Court, so far from treating them as independent decrees, makes them advert to each other, and incorporates the consequential relief resulting from each. Though Eyton was not a necessary party to the second suit, yet when his right to redeem was to be measured by the result of the decree in the second suit, it is idle to say he has no interest. It is only upon this hypothesis that you can reconcile the subsequent order, which, consolidating the two suits, gave to the parties in one, that quantum

(1) *Ante*, p. 33.

(2) 2 Myl. & Cr. 89; s. c. 6 Law J. Rep. (N.S.) Chanc. 169.

of interest in the other, which made it necessary in reviving one, to revive the other with it. That order was made in the two causes, but it is said, it must be revived by two separate orders.

[ALDERSON, B.—Multifariousness is an objection to the discretion of the Court; whether would it not, after that order, be the best exercise of that discretion to overrule the demurrer?]

[*Mr. Simpkinson*.—That order was made after the death of Eyton, and is a nullity.]

[ALDERSON, B.—It is at least a declaration of the Court, that it was proper to consolidate them.]

J. H. Douglas is interested in both suits; and on the authority of *Campbell v. Mackay* (3), Eyton has no right to object, because this bill extends to revive the second decree.

The mortgage suit cannot be revived without Eyton; and that decree cannot be worked out without reviving the second suit also—*The Attorney General v. Cradock* (4), *The Attorney General v. the Corporation of Poole* (5).

[ALDERSON, B.—What is the common object of these two suits?]

There is nothing here to render two bills of revivor necessary. *Cui bono* as to Pugh? The allotment goes to the owner of the lands in respect of which it is made, subject to all the equities.

[ALDERSON, B.—It may be that B. Lloyd is a trustee for other parties.]

A demurrer for multifariousness admits that there is some equity. If an original mortgage suit were brought, could not Pugh be made a party? If so, what prevents the engrafting of this additional right on the bill of revivor?

[ALDERSON, B.—By your bill, you only seek to fix J. Douglas as *purchaser*, and then Pugh must be a party.]

Pugh had only an equitable interest; no deed of conveyance was wanted; he has parted with his interest to J. Douglas, and is indemnified. No decree could be asked against Pugh. Besides, they have

already pleaded to the original bill, and therefore cannot now demur to the amended bill.

Mr. Simpkinson, in reply.—A demurrer to an amended bill may be put in after a plea allowed—*Robertson v. Lord Londonderry* (6), *Prosser v. Edmonds* (7), *Stephens v. Frost* (8). As to Eyton, the suits were not consolidated. Eyton could only attend the Master in the first suit. The award of the commissioners conveyed the legal estate to B. Lloyd, and the bill states that Douglas entered as purchaser.

ALDERSON, B.—It is not necessary, if even it were possible, to lay down any general rules on the subject of multifariousness, because the cases, as the Lord Chancellor has well observed in *Campbell v. Mackay*, do not appear reconcilable. But this is quite clear, that where a plaintiff introduces more than one distinct and unconnected subject matter of relief into his bill, and thereby unnecessarily inflicts on a defendant or defendants a great increase of expense, vexation, and delay, this ground of demurrer is properly given to them to prevent such inconvenient results. Where, however, there is one general relief prayed against some of the defendants, which, as to some portions of it, involves third persons, there, as in the case of *The Attorney General v. Cradock*, the objection fails; for the relief prayed against such third persons is not, properly speaking, in such cases unconnected with the general relief sought; and the plaintiff, so far from unnecessarily including it in the same bill, has, upon the whole, followed the most convenient course. Let us see to which of these two classes the present case bears most resemblance. It appears from this bill, that John Douglas was the assignee of a mortgage in fee, dated the 6th of June 1809, whereby a capital messuage and land, and other hereditaments, in the county of Flint, were conveyed to secure 3,000*l.* and interest, advanced to Baldwyn Lloyd and John Lloyd. He was also the assignee of a second mortgage of

(3) 1 Myl. & Cr. 603; s. c. 6 Law J. Rep. (N.S.) Chanc. 73.

(4) 3 Ibid. 85; s. c. 6 Law J. Rep. (N.S.) Chanc. 341.

(5) 2 Keen, 190; s. c. 8 Law J. Rep. (N.S.) Chanc. 27.

(6) 5 Sim. 226; s. c. 3 Law J. Rep. (N.S.) Chanc. 20.

(7) 1 You. & Col. 481.

(8) 3 Ibid. 302; s. c. 6 Law J. Rep. (N.S.) Ex. Eq. 41.

the same premises to secure a further sum of 1,000*l.* and interest; there being also assigned by John Lloyd as a further security for this latter sum, certain other property therein mentioned. This latter property was also mortgaged by John Lloyd to secure a further sum of 700*l.* and interest, and of this mortgage also John Douglas was the assignee. Under these circumstances, John Douglas filed his bill in December 1820 against Baldwyn Lloyd, the representatives of John Lloyd, and a person named Thomas Eyton, who, it was stated, alleged he had some right or interest in the equity of redemption of the mortgaged premises, praying an account as to the first two mortgages, and a foreclosure in case of non-payment. On this cause being heard, a decree was pronounced, referring the accounts to Master Spranger; and the Court declared that, as far as regarded the interest of Baldwyn Lloyd as mortgagor, under the second mortgage, the profits arising from the premises assigned as an additional security were to go in discharge of the sum of 1,000*l.* and interest, before any part thereof was applied in discharge of the third mortgage of 700*l.* and interest. It then provided, that whatever should be found due on the result of a suit instituted by Baldwyn Lloyd against Douglas should be applied in payment of the ultimate balance (if any) found due from Baldwyn Lloyd to J. Douglas on the two first mortgages; and that on payment of the then balance, the premises should be reconveyed without prejudice as to any claim he might have on the third mortgage, as to the premises covered by it. The suit referred to in this decree, which was heard on the same day with the one I have already mentioned, was one by B. Lloyd against J. Douglas, and the representatives of John Lloyd, by which, after stating the three mortgages before mentioned, and the receipt of monies under a sale of part of the premises conveyed, as an additional security by the second mortgage, and an agreement with J. Douglas for the absolute sale of a portion of the originally mortgaged premises for a sum ascertained by arbitration, and Douglas's possession of such portion, he prayed an account of the second mortgage of 1,000*l.* and interest, and of the sums received in discharge

thereof, and a sale, if necessary, of the rest of the premises assigned as further security; and a specific performance of the contract of purchase, and an account of purchase-money, interest, and profits; and of the 3,000*l.* mortgage and interest; and that Douglas might pay what should be found due, and reconvey the mortgaged premises, excepting that part included in the purchase. This cause was referred to Master Richards to take the accounts prayed, and to set off one balance against the other. To this suit Thomas Eyton was no party. By an order made after the death of Eyton, this second cause was, in June 1827, transferred from Master Richards to Master Spranger, who was thereupon ordered to retake the accounts in both causes. The first question which arises is, whether the present defendant Eyton, who is the personal representative of T. Eyton, is interested in both these suits, so as to make this bill, by which the present plaintiff seeks to revive both these suits against him as well as against J. H. Douglas, multifarious. If the case rested upon this point alone, perhaps there would be some difficulty in coming to such a conclusion; for the accounts taken in each case are substantially the same; and the right to have a reconveyance, on payment of the balance, which balance depends on both suits, and in which Thomas Eyton must be considered as interested, might, perhaps, give some grounds for the very ingenious argument addressed to the Court against the demurrer. But even as to this, I think I must ultimately have held, that the two suits were in their nature distinct, and that involving the representative of Eyton in both, exposed him to additional inconvenience and expense, and that he would have been entitled to my judgment on this ground. But it is unnecessary to discuss this, as I entertain a clear opinion that the introduction of the question, as to the claim upon J. Douglas, in respect of the allotment sold by B. Lloyd to Pugh, renders the bill multifarious. It is stated in the bill, that an allotment was, in the year 1814, made to B. Lloyd by certain commissioners, in respect of his right of common, as owner of the mortgaged premises. This allotment was sold by auction

by B. Lloyd for 470*l.* to Pugh, who entered into possession after paying 47*l.* deposit, and so continued for several years. J. Douglas, after this, having acquired the assignment of the first mortgage, recovered possession of the premises from B. Lloyd; and then the bill states, that by some agreement with Pugh, J. Douglas, in 1836, obtained possession of the land sold to Pugh, and of which a part of the purchase-money, viz. 423*l.*, still remains unpaid. And the bill claims, against the representatives of John Douglas, a lien on the land for the sum of 423*l.* and interest, and the repayment thereof to the plaintiff, as B. Lloyd's representative, and the bringing such amount into the accounts to be taken in the two causes. But with this claim, as it appears to me, Eyton's representatives are wholly unconnected. This question of lien depends entirely on the transactions between Baldwyn Lloyd and Pugh, and that between Pugh and Douglas. It seems to me to stand precisely on the same grounds as any other transaction between Baldwyn Lloyd and Douglas, on matters wholly unconnected with Eyton. To introduce him or his representatives into such a contest is wholly unnecessary, and therefore improper. His rights are unaffected by it, and ought not to be postponed till this question is determined; nor ought he to be saddled with the additional expense and delay which the introduction of this subject into this bill, necessarily must occasion to him.

For these reasons I think the demurrer must be allowed to this bill, as being multifarious. I do not think that Pugh is a necessary party. The decree cannot affect his interest. If the account be taken of all remaining due on this contract, and discharged by Douglas, he will be exonerated, because the account will bind Lloyd, the plaintiff; and Douglas, after discharging this amount, according to the statement in the bill, can have no claim on him. This bill states that Pugh delivered up the land, receiving no consideration for it. On demurrer, I must take the statement to be correct. In no event, therefore, can he be affected; nor is his presence necessary in taking the account; for, as to that, Douglas has undertaken to represent him, and to pay what shall be due, and to

indemnify him altogether. But for the other objection, the demurrers must be allowed.

ALDERSON, B. }
Feb. 25; March 10. } WEST V. COLE.

Will—Devise of a Mixed Fund for Payment of Debts—Contribution pro ratâ.

A, by his will, gave to trustees real estate, and certain portions of his personal estate, in trust to sell and apply the produce, in the first place, in paying his debts, funeral and testamentary expenses, and the costs of executing the trusts of his will. He then directed certain legacies to be paid out of the produce of the real estate, and gave the residue of such produce to B and C for life, with remainders over; but he made no disposition of the residue of the produce of the personal estate:—Held, that this mixed fund should contribute pro ratâ to the payment of the debts, &c. and that the surplus produce of the real estate, after payment of the legacies, should go according to the directions of the will, and the surplus of the personal estate to the next-of-kin.

Richard Matthias, by his will, gave to his trustees W. Cole and W. Davis, whom he also appointed his executors, all his manor of H., with the mansion-house, mill, and other appurtenances, together with the great and small tithes, and certain other lands in the same parish, upon trust, within twelve months after his decease to make absolute sale of the same; and the trustees were to stand possessed of all the monies to arise from the sale thereinbefore directed, and of the monies or securities of or to which the testator was possessed or entitled at the time of his decease, and the rents, issues, and profits of the manors, &c. until the same should be disposed of, upon trust, in the first place to pay all the testator's just debts, including a sum of 2,000*l.* due on mortgage, and the interest thereof, his funeral expenses, the costs of establishing and proving his will, and carrying the trusts thereof into execution, and afterwards to pay the several legacies by his will given to his relations, servants, and labourers; and after payment thereof, to invest 1,000*l.* in the public funds, or on real security,

and pay the dividends, &c. to his wife for life, with remainder over. The testator then gave out of the purchase-monies of the said manor, &c. certain legacies to his relatives and servants. And as to the remainder of the purchase-monies of his said manors, tithes, and real estates thereinbefore directed to be sold, after the payment of the debts, sums, and legacies thereinbefore mentioned, the trustees were to invest the same in the public stocks, &c. and pay the interest to the testator's two sisters Mary Matthias, and Margaret Anne West, in equal shares, during their lives, with remainders over. The testator then gave to his trustees the whole of his stock, crop, and implements of husbandry, dairy and brewing utensils, household furniture, &c. both at H. and elsewhere (not before disposed of), in trust to apply the same to certain charitable uses therein specified. By the will, it was provided, in case of the trustees not being able to sell the manors, &c. that they should raise the requisite sum for the payment of debts and legacies by a mortgage of the same. The property was all sold by the trustees, and the produce was paid into court. The will having specifically devised the residue of the produce of the real estate, but giving no directions as to the residue of the personal estate, a question arose between the next-of-kin, and the persons entitled under the will to the surplus of the real estate, out of which part of the fund the testator's debts should be paid.

Mr. Simpson and *Mr. Martindale*, for Mrs. West, one of the next-of-kin.—For adjusting the rights of the parties, the question is, whether the words of the will amount to a charge only of the debts on the real estate, or whether a duty is not imposed on the trustees, of applying these two portions *pari passu* in payment of the debts. If the latter is the intention of the testator, the Court will carry it into effect. The decisions are collected in 2 *Williams, Executors*, p. 1211 to 1218, and they all profess to proceed on the intention. In *Boote v. Blundell* (1), Lord Eldon says, there are no two cases in which the Court has altogether agreed.

[ALDERSON, B.—The only question is,

(1) 19 Ves. 516.

whether the personal estate shall be applied *pari passu* with the produce of the real estate.]

In *Roberts v. Walker* (2), the words of the will are "as to the produce of my real and personal estate, in trust to pay, satisfy, and discharge all my just debts, and all charges of my executors," &c. The mixed fund in that case consisted of the entirety of the personal estate. Here it is only a portion. A similar principle was acted upon in *Eyre v. Marsden* (3). The whole fund must be applied *pro rata* in the payment of the debts, and the residue of the personalty go to the next-of-kin of the testator; and the residue of the produce of the real estate according to the directions of the will.

[ALDERSON, B.—The difference between *Roberts v. Walker* and the present case, is this: there the testatrix created a general fund of real and personal estate, and proceeded to dispose of it as such; here the fund is the produce of real estate, and of a particular portion of the personal estate; and then it is directed that the legacies shall be paid out of the real estate. Upon the whole, it appears, that the testatrix was fully convinced that the personal estate would be exhausted by the debts alone. In so construing the will, should I not go according to the general rule of law, that the personal estate must be first exhausted?]

In *Dunk v. Fenner* (4), the produce of the real and personal estates were to contribute *pro rata*.

Mr. Wilcock, for the husband of Mrs. West.

Mr. Bethell, for the other next-of-kin.—The testator has charged this mixed fund with every kind of expense to which the general personal estate is ordinarily liable, intending it as a fund to answer the expense of the administration of the whole of his estate. The ordinary rule is not here applicable. It depends on the testator's intention, and it is clear he meant to exonerate every other part of the estate, whether disposed of or undisposed of. The bequest in this particular form amounts to an exoneration of all the other personal

(2) 1 Russ. & Myl. 752.

(3) 4 Myl. & Cr. 240; s. c. 7 Law J. Rep. (N.S.) Chanc. 220.

(4) 2 Russ. & Myl. 566.

estate—*Bootle v. Blundell*, *Hartley v. Hurle* (5), *Browne v. Groombridge* (6), *Choat v. Yeats* (7). In both the last cases, the general personal estate was held exonerated, on the ground of the testator having charged specific portions of his personal estate. It is said, that next-of-kin claim in the absence of intention, and therefore cannot avail themselves of the benefit of the rule. But that is a fallacy. The decisions authorize you to give the same benefit to next-of-kin, as to a legatee of the residue—*Donne v. Lewis* (8), *Milnes v. Slater* (9). *Waring v. Ward* (10) is not conflicting, being decided upon another principle. *Roberts v. Walker* recognizes this principle, that when the testator has united real and personal estate, charging the produce with all the liabilities to which the general personal estate would be first liable, then the funds shall bear the burden equally, and the residue devolves on the heir-at-law and the next-of-kin respectively, after each portion has borne its proper proportion of the burden. If a testator give legacies out of the produce of a real estate, they must come out of such produce exclusively—*Spurway v. Glynn* (11), *Hancox v. Abbey* (12).

Mr. Girdlestone and Mr. Stinton, for the parties claiming under the will.—*Bootle v. Blundell* defines the rule of construction that there must be not only an intention to charge the real estate, but also to exonerate the personal estate. The testator, after creating a mixed fund for the payment of debts, disposes of the residue arising from the real estate only, but makes no disposition of the residue arising from the personal estate. The presumption from that is, that he knew there could not possibly be any surplus of the personal estate: the real estate was only therefore given in aid. It is clear he thought he was disposing of his whole estate. The devisees of the real estate are entitled to have the whole of the produce of the real estate that remains after the personal estate has

been applied in payment of the debts, &c. *Donne v. Lewis* was a question between the heir and devisee, and has no analogy to the present case; for the rules of law as to real and personal estate are quite distinct. In *Milnes v. Slater* there were clear words of exoneration of the personal estate. The whole of the proposition in *Roberts v. Walker* is, that where a general purpose fails, that does not raise a presumption of intention in favour of the heir. That is different from the question, whether that which would ordinarily form a fund for payment of debts, is exonerated. The general personal estate is not exonerated, unless it be satisfactorily made out from the whole context of the will, that such was the intention of the testator—*Walker v. Hardwick* (13).

[ALDERSON, B.—Have you any case upon the subject of a mixed fund of real and personal estate? because, there is a broad distinction between that and a general charge.]

If the testator here had disposed of the surplus of the personal estate, then the question in *Roberts v. Walker* would have arisen. The testator only disposing of the surplus of the produce of the real estate, is strong evidence of his intention, that there should be no surplus of the personal fund.

ALDERSON, B.—It seems to me, that it is better to adhere to the general rule, than to adopt conjecture as to the particular intention of the testator. We should more generally carry into effect intentions of the testator, by subjecting these questions to a general rule. It appears, that the first general rule is, that where a testator creates a mixed fund of a portion of his personal and real estate, and appropriates that fund to the payment of debts, it is primarily liable, because the testator so intends it, and that the residue of the personal estate is chargeable only, after the primary fund fails, else why does a man create a fund at all? To take it out of that rule, there must be clear evidence to the contrary. The case of *Roberts v. Walker* establishes this, that where a mixed fund is created out of a portion of real and personal estate, the

(5) 5 Ves. 540.

(6) 4 Mad. 495.

(7) 1 Jac. & Walk. 102.

(8) 2 Bro. C.C. 257.

(9) 8 Ves. 295.

(10) 5 Ibid. 670.

(11) 9 Ibid. 483.

(12) 11 Ibid. 179.

(13) 1 Myl. & K. 396; s. c. 2 Law J. Rep. (n.s.) Chanc. 104.

payment must be made out of that mixed fund, and go in reduction of the mixed fund; so that what remains shall remain a mixed fund, rateably consisting of the monies and securities, and the produce of the land. Now, here that portion of it which belonged to the land, has been specifically bequeathed; but, by some accident, the testator has said nothing as to the surplus of the personal estate. It seems to me, that the law has settled the matter. The persons entitled to the personalty must have the residue of that part of the fund, and the persons to whom the residue of the produce of the land has been bequeathed must take that, after each part has borne a proportionate part of the burdens imposed on it by the will.

C.B. }
April 24. } NORRIS v. DAY.

Injunction — Account — Principal and Agent—Set-off.

Action by A. against B. and C, upon a stated account, for commission and expenses as an architect. Bill by B. and C. against A, charging fraud and praying accounts, and an injunction to restrain the action. On motion, an injunction on the merits was refused, on the ground, that though the jurisdiction was concurrent, yet the court of law had first possession of the case; but the bill was retained to abide the issue of the trial at law, that the plaintiff might have the benefit of it if it should then appear that there were matters which could not properly be investigated in a court of law.

Semble—Where an agent brings an action for his commission, &c., and has by collusion received more than he is entitled to, a court of law in some cases will allow a set-off, by treating him as having received so much money for the use of his employers; but it must be a clear case.

In 1836, the society of Jesuits were desirous of building two chapels, one at Bury St. Edmunds, and another at Hereford, and through the plaintiff Norris, the provincial of their order, employed the defendant Day, as an architect, to make the drawings, plans and specification. On the 15th of

April 1836, Newham, a builder, entered into a contract with one Tate, on the part of the society, by which he agreed to build the chapel at Bury, according to the plans, &c. to the entire satisfaction of the society, for 5,050*l*.

On the 1st of July 1837, Hether and Pritchard entered into a contract with one Postlewayte, on the part of the society, to build the chapel and house at Hereford, for 5,684*l*. 15*s*. 4*d*. The building was to be finished according to the satisfaction of Day. The deeds of contract contained the following provisions — namely, that the contractors respectively should follow the instructions of the clerk of the works for the time being of Day, or other the architect for the time being; that the contract should include all that was requisite for the completion, and that no extra charge should be made; that the building should be completed within a specified time, with certain penalties in case of default. The deeds also contained a provision, authorizing Day, in case the contractors did not employ competent workmen, to employ other workmen at such prices as Day should think proper, and the certificates in writing of Day, of the sums to be paid in such case by the contractors, should be binding on all parties. And further, that in case the contractors should at any time not execute their work according to the agreement to the satisfaction of Day, or in case of unnecessary delay, it should be lawful for Day, or the clerk of the works, to give notice in writing to them to proceed, and if, after that, they should make default for three days, it should be lawful for Day, &c. to employ other workmen, either by contract or by measure and value, and to complete the works as the contractors ought to do, and to pay for such work and materials; the amount of which, at the option of the society, was to be paid by the contractors, or deducted out of any balance due to them. There was a covenant that Day should have full power to make any alterations or additions he thought fit, and that the contractors were only to obey the directions of Day, or other the architect, &c.; and there was a proviso giving a reference to Day of all matters in dispute. It was admitted by the answer, that this deed was framed by

the solicitor of Day. Thornton was appointed by Day clerk of the works, and the building was proceeded with. Some time afterwards, the Bury chapel was abandoned by the contractors, and was taken in hand by Day, under the powers given him by the deed. In November 1837, disputes arose between H. and P. and Day. The three days' notice was given, and on the 28th, H. and P. were discharged, and those works also were taken in hand by Day, with the concurrence of the society. In February 1838, H. and P. filed their bill against Postlewayte and Day, for an injunction to restrain them from carrying on the works, which was refused; Pritchard then became bankrupt, and in June 1839, an arrangement was come to between his assignees and Hether and the society, the effect of which was a mutual release of all claims. Day carrying on the works, the society became dissatisfied with the extent of his expenditure, and letters were written by their solicitor, calling on Day for accounts, and warning him not to incur expense beyond the sum mentioned. On the 19th of December 1838, Day sent in a certificate, to the effect, that in consequence of the default of H. and P., he had employed workmen, &c., and had paid, &c., to the amount of 6,000*l.* and upwards, which Postlewayte was entitled to receive from H. and P. according to the agreement.

On the 29th of June 1839, the society discharged Day, and required him to give up the contract, which Day however declined to do till the outstanding claims were settled. On the 21st of December 1838, Day had given in the account of his claim, in respect of Bury chapel, 781*l.* for commission and expenses. He had also given in his claim for commission and expenses at Hereford chapel, 1,380*l.* The solicitor of the society then demanded an explanation of the items, which Day refused. On the 20th of March 1840, Day brought an action against Norris and Postlewayte, for the balance due to him upon the two works. Norris and Postlewayte then filed their bill, charging against Day various specific acts of misconduct, and that this large amount of expenditure was incurred by Day, in doing works which he had no authority to do, and also in consequence of his certify-

ing an amount expended much greater than the true amount, and particularly that he certified a greater amount than what was really due to W. and P., who supplied the cement: that during the contract of H. and P., it was charged at 1*l.* per cask, but was afterwards increased to 1*l.* 2*s.* 6*d.*, and that W. and P., on the day of payment, handed over to Day a cheque for 50*l.*, for his own use. The bill prayed, that it might be declared that Day, by his conduct, had forfeited all right to his commission, if not *in toto*, then to more than what was properly expended in work and materials; then that the accounts might be taken, &c., and also the accounts of all monies certified to be due to the different workmen supplying goods by his authority; and for an injunction to restrain the action. The answer of the defendant alleged, that after the default of H. and P., he engaged workmen under the direction of Postlewayte; and that Thornton, the clerk of the works, was the agent of Postlewayte; that he (Day) acted only as an architect, and not as a builder. He admitted, that the cement-manufacturers requested to be allowed to make him some present, because he had been serviceable to them in their business, and he consented to accept the 50*l.*

Mr. Girdlestone and *Mr. Teed* now moved, on the merits, for an injunction to restrain the action at law. If the sum sought to be recovered at law, is a sum that the plaintiff at law ought not to recover, and the circumstances of the plaintiff are such that irreparable mischief may be done; and if it can be shewn that there is an equitable question to be decided between the parties, the pendency of that question is sufficient to obtain an injunction. After the discharge of the contractors, Day became the plaintiff's agent, and, as such, was liable to account for the due discharge of his duties. The question is not whether they have a good defence at law against Day's claim, either in the whole or in part; but the case is, that they have a claim in equity against him, and a defence against his claim. As their agent, they have a right to call on him to account. All they have to make out is to establish a case entitling them to inquiry. The expenditure has been excessive, and various

overcharges by tradesmen have been allowed by him, and the work for which he has charged his commission has never been done.

[LORD ABINGER, C.B.—Is not this matter of law?]

If they fail at law, the plaintiffs have still a cross demand against him in equity; and then it is a question, whether they are not entitled to call him into equity at once, and to ask for an injunction. The circumstance of the accounts being involved, is sufficient inducement to the Court to exercise the jurisdiction. As to the 50*l.*, in *The East India Company v. Henchman* (1), it is laid down "that if a servant by collusion takes greater profits than belong to his office, that is a fraud upon which an account may be demanded." That is this very case. That case was confirmed by *Massey v. Davies* (2), *Corporation of Carlisle v. Wilson* (3), and *Mackenzie v. Johnston* (4), in which last case it is said, "it is monstrous, that in a case of concurrent jurisdiction, a man shall file a bill of discovery only, and pay the defendant his costs, instead of filing a bill for relief and discovery." As complete justice cannot be done in a court of law, the plaintiffs are entitled to an injunction.

Mr. Simpkinson and *Mr. Keene*, contra, were not called upon by the Court.

LORD ABINGER, C.B.—This case has been very properly argued. If it were a question whether I should dismiss the bill or not, the argument is conclusive against dismissing it. But the question is in this form. An action has been brought by the defendant against the plaintiffs, who then file their bill, in which they suggest matters of account and fraud, both of which give the Court jurisdiction. If this bill had been filed in the first instance, and this Court had obtained jurisdiction first, I never should have permitted the defendant to bring his action at law; if he had brought such action, it would have been a fit case for an injunction. But a court of equity and a court of law have concurrent jurisdiction in this matter, and

as the jurisdiction of the court of law has been set in motion first, ought this Court to stay the proceedings? I think not. None of the cases cited were cases of injunctions prayed and granted against proceedings at law, but were questions of concurrent jurisdiction. But there are particular circumstances in this case which, it may be properly argued, appeared more fit for the consideration of a court of law than a court of equity; but supposing no action at law brought, and I had had to investigate this transaction, it is more than probable, in the course of the inquiry, that I must have directed an action at law upon this point. As long as the contract between the contractors was depending, and the work was done under the contract, the certificate of Day was binding upon the contractors. If the plaintiffs had paid, and brought an action against the contractors, it would have lain, because the certificates were properly granted, unless the plaintiffs had colluded with Day; if they had paid *bond fide*, the contract would have enabled them to recover the money. But as soon as the contract was abandoned, Day assumed a new character; his certificates no longer bound anybody, they simply authorized the plaintiffs to pay the tradesmen, but they did not bind the tradesmen; still less would Day be entitled, because of the contract, to 5*l.* per cent. upon all the subsequent expenditure. What he would be entitled to would be for his work and labour. If, then, it is upon a *quantum meruit*, how can this Court deal with it? If Day's claims are made up partly of a compensation certain, and partly of a *quantum meruit*, it is a fit question for a jury. Matters may possibly arise which it would be improper for me to decide; therefore I can grant no injunction. This is a question of account and fraud. Suppose Day made use of his situation improperly, to obtain benefits for himself, which in point of justice he ought to have given to the plaintiffs: a court of equity would treat him as a trustee; and a court of law would in some cases do so too, by treating him as a person receiving monies for the use of his employers. Lord Mansfield used to say, that an action for money had and received was like a bill in equity; therefore, there might be cases

(1) 1 Ves. jun. 287.

(2) 2 Ibid. 317.

(3) 13 Ibid. 276.

(4) 4 Mad. 374.

where the abuse of a trust would raise a set-off at law. But, again, there may be cases in which it would be so questionable, that a court of law would not assume jurisdiction; in that case, a plaintiff would have recourse to a court of equity. But there are still reasons why I should not stop the proceedings at law. It would be much better to refer it to arbitrators to examine the witnesses upon oath; but if it must come to the open court, I think a jury is the fittest tribunal. Day has already put the courts of law in motion; when the result of that is fully known, if it appear that there are matters which could not be properly investigated there, then the plaintiffs may have the benefit of their bill. A plaintiff, for an account at law, must offer to pay what is due. But suppose it should turn out that the plaintiff at law loses the verdict, that would not give the plaintiffs here any balance which they may claim; therefore, they have a right to have the benefit of their bill.

Injunction refused, with costs.

C.B.
May 21, 23. { *Ex parte GARDINER re*
 EASTERN COUNTIES RAIL-
 WAY COMPANY.

Vendor and Purchaser—Petition—Specific Performance—Unpaid Purchase-money—Rescinding the Contract.

*In March 1837, A. contracted with B. for the purchase of certain property for 2,500*l.*, 400*l.* to be paid immediately, and 1,100*l.* in April following, and the remaining 1,000*l.* to remain on mortgage of the property, and on the payment of those two sums, and on the execution of the mortgage, B. was to convey to A. The contract contained a clause, that the presents should be void if A. failed to perform his agreement, and that, in such case, B. should have power to re-sell, and A. be liable for the deficiency. The 400*l.* was paid, and various other sums, amounting to 835*l.*, but not within the time limited by the contract. In November 1837, A. gave to B. a warrant of attorney in ejectment, on which judgment was signed on the 6th of January 1838, and a writ of execution issued on the 13th. The last payment by A. was on the 22nd of February 1838.*

In June, A. contracted to sell the premises to the Railway Company for a larger sum than he had agreed to give to B, and the money was paid into court. In July, B. demanded the residue of his purchase-money, and A. being unable to pay, B. insisted upon rescinding the contract; and served notices upon A's tenants not to pay rent to him. In 1840, A. became bankrupt, and his assignees now petitioned to have this money paid to them, after deducting the amount due to B. B. insisted that A. had broken the contract, by not paying the purchase-money within the time limited; that he, B, had a right to rescind the contract, and had done so by signing the judgment in ejectment, and by the service of the notice, and that he was therefore entitled to the whole purchase-money in court as owner of the property:—Held, that B. had waived his right to rescind the contract under the clause, by receiving payments after the time had expired; that the judgment in ejectment did not put an end to the contract, and was but a security for the unpaid purchase-money, and would be so held in a court of law, upon A. tendering the balance and costs, especially as B. had received a payment from A. after it was signed. And, semble, if B. had made a re-sale of the property, he would have been a trustee of the surplus for A.

A petition is a convenient and competent mode of settling the rights of parties in a question of this kind, and a great saving of expense.

J. West, being indebted to Currie & Co., executed a mortgage to them of certain freehold and copyhold and leasehold premises to secure the sum of 5,000*l.*, with a power of sale, &c. A certain part of the mortgage money had been paid off when West became bankrupt in February 1837; Martin, who was the foreman of West, then purchased of his assignees the stock in trade, &c., and entered into a contract with Messrs. H, the solicitors of Currie & Co., dated the 29th of March 1837, to purchase for 2,500*l.* the three messuages, &c., late in the possession of J. West; and the terms of the contract were, that Martin should pay down 400*l.* upon the signing of the contract, and 1,100*l.* on the 22nd of April following, and that 1,000*l.*, the residue of the purchase-money, should re-

main upon the security of the premises; that Currie & Co., upon the receipt of the two sums of 400*l.* and 1,100*l.*, and the execution of the mortgage for 1,000*l.*, should execute a release to Martin: and there was the usual stipulation, that if Martin did not perform the agreement, these presents should be void, that Currie should be at liberty to re-sell, and Martin should be liable for the deficiency. The 400*l.* was paid by Martin, who commenced business upon the premises. Various other sums were afterwards paid by him (but not in conformity with the agreement), amounting in the whole to 835*l.*; the last of which payments was made on the 22nd of February 1838. The Eastern Counties Railway Company, requiring the premises, entered into a negotiation with Martin; and an arrangement was finally come to between Martin and the company on the 26th of June 1838, by which it was agreed, that Martin should be paid —*l.* for the premises, and —*l.* for the good-will. In March 1840, Martin became bankrupt, and the petitioner Gardiner was the creditors' assignee, and Pennel official assignee. In consequence of Currie & Co. and the respective assignees of West and Martin having given notice to the company of their claims, the money was paid into court. It appeared by the affidavit of Messrs. H. that various applications had been made by them to Martin for the remainder of the purchase-money; and that on the 20th of November 1837, Martin gave to Currie & Co. a warrant of attorney to confess judgment in ejectment, upon which judgment was entered up on the 6th of January 1838, and a writ of execution issued on the 13th following. That on the 13th of July, Messrs. H. had an interview with Martin, who was then asked if he was prepared to pay the remainder of the purchase-money, and on his answering in the negative, Messrs. H. said, they would rescind the agreement. That it was not till March 1839, that they, Messrs. H. knew that the company were to give a larger price for the premises than Martin had agreed to give to Currie & Co.; that Martin had never received the rents of the houses after the contract was so rescinded, in consequence of a notice served on the tenants by Messrs. H. to that

effect; and that Currie & Co. did not take possession in consequence of the expectation that the company would immediately do so.

The affidavit of Martin stated, that he was always treated by Messrs. H. as the purchaser of the premises till he had entered into the contract with the Railway Company, and that when he executed the warrant of attorney, he was not at all aware of the nature of it. That in June 1838 he had tendered the remainder of the purchase-money, which was refused.

This was the petition of the assignees of Martin, and it prayed that the petitioners might be declared entitled to the —*l.* paid for the good-will, &c. of the business, and that it might be referred to the Master to ascertain who were the parties entitled to the residue of the monies paid into court by the company.

Mr. Simpkinson and Mr. Keene, for the petition. —The question is, whether time is of the essence of the contract in this case. The clause of avoidance in the contract is in the usual form. Whatever might have been the construction of the agreement, if Currie & Co. had insisted upon a literal performance, they have waived that right by their acts, *i. e.* by receiving a portion of the purchase-money after the time had expired. If they had meant to rescind the contract, they should have offered to pay back to Martin his purchase-money.

[ABINGER, C.B.—Suppose the question of compensation had gone before a jury, and they had found the value less than the amount due to Currie & Co., could Martin have then said, I will abandon the contract with Currie & Co. ?]

Mr. J. Russell, for subsequent incumbancers in the same interest with the petitioners.—The only right of Currie & Co. was to re-sell the property; and the excess, if any, they would have held as trustees for Martin. The judgment in ejectment was in the nature of a security only.

Mr. Campbell, for the Railway Company.

Mr. Roupell, contra, for Currie & Co., and the assignees of West.—This is a question of specific performance, comprising two distinct contracts, and a variety of nice points, and is not such a case as the

Court will deal with in a summary way, by petition and a reference to the Master.

[LORD ABINGER, C.B.—I am glad the objection has been taken, as it gives me an opportunity of stating, that this is an example of a complicated case, which may be decided in a summary way, with perfect justice and propriety, without the incumbrance and expense of a bill, answer, and evidence.]

The payment of the money into court does not disturb the vendors' right. They may confirm the contract, but not under Martin. Under the circumstances, they could not have a specific performance upon a bill filed, because of the conduct of the purchaser. The judgment in ejectment put an end to Martin's right.

[LORD ABINGER, C.B.—Suppose that judgment executed, without any written notice, upon Martin demanding the balance, and Martin had applied to the court of common law, stating that, and also that money had been received on account since the signing of the judgment, and that it was merely a security, and that he was ready to pay the balance; the vendor would never be allowed to say, he never meant the contract to be still open, but the Court would set the judgment aside upon payment of the balance and costs.]

Suppose the vendors had entered into a contract with the company, and had come here for the money, could Martin have opposed their right? The question is, whether they are not now entitled to enter into a contract with the company, equally as if Martin had done nothing.

LORD ABINGER, C.B.—This case is complicated, from the number of facts; but the principle does not appear to me to admit of much controversy. The question arises upon the construction of the statute, under which the money has been paid into court, and the jurisdiction of the Court is founded upon the words of the statute. Several of these statutes have presented a useful form, in which the legal priorities of interest may be investigated without the expense which has long been a reproach to the law. This petition must be considered as a bill for specific performance. Suppose, then, a bill had stated these facts; that Martin had made the contract; that it was very true

that he had not paid the money on the 22nd of April, but that the parties had agreed to give him further time, and on the 20th of November 1837 had taken, as a security, a warrant of attorney to confess judgment in ejectment, and had agreed to keep it in their hands merely as a means to compel payment of the money. The time for payment having been entirely dispensed with, therefore the vendors could not with propriety have refused to perform their part of the contract. Martin after that pays further money on account, viz. 835*l.*, the whole money paid amounting to 1,235*l.* In June 1838, he signifies his willingness to pay the remainder, having made a beneficial contract with the company; Messrs. H. refuse to receive it, and Martin then applies for a specific performance. Could the vendors have made use of that clause in the agreement? They could not in equity, and even at law they have waived it. A court of equity could not say, that time was originally of the essence of the contract, as the vendors held a security, and were not to convey till they were paid. They must then have performed their contract, supposing nothing had happened to change the situation of the parties. There has been a beneficial sale, and the amount of that sale may be the motive operating on the minds of either party to enforce or rescind the contract, but it cannot alter the rights of the parties. They stand in the same situation now as if a bill had been filed in June 1838, and Martin had tendered the money. Could the vendors then have made it a ground of refusal that they expected to sell it at a better price, and should stand upon the words of the contract? They could not then have enforced that power, if they had given no written notice to demand the money, saying, "If you do not pay within a given time, we will rescind the contract." A court of common law would have set aside that warrant of attorney, and put the parties in a situation as if no such judgment had been signed. Under these circumstances, how can I do otherwise, than if it were a bill filed for specific performance? It appears to me, that whatever authority the vendors had to avoid the contract under that clause in the agreement, which required payment on

the 22nd of April, they have done away with; so that if payment be made within a reasonable time, it is sufficient. I am also inclined to adopt the suggestion, that if the vendors, under the terms of the contract, had made a re-sale, they would have been trustees for Martin, as to the surplus, if any; because the contract makes Martin liable for any deficiency. If the vendors had made the contract with the company, and the money had been paid into court or paid to them, I should have held Martin entitled to the surplus. Under these circumstances, I must make an order that Martin's assignees are entitled to the corpus of the money, subject to the unpaid purchase-money, and the other incumbrances.

Order accordingly.

C.B. }
April 23. } JONES V. POWYS.

Taxation of Solicitor's Bill—Payment.

Order for taxation of a solicitor's bill under the circumstances, after a settlement, upon the common petition, without stating the objectionable items.

The defendants in the suit were small farmers in Wales, and had contracted to purchase certain cottages. A bill was filed against them, and a decree had for specific performance. It appeared, that during the progress of the suit the defendants had paid various sums to their solicitor on account of costs, and also on account of the purchase-money. On the defendants requiring a settlement, the solicitor handed in his bill of costs, amounting to 143*l.*, by which it appeared, that, giving credit for the sums received by him, 10*l.* was due from him to the petitioners; and he then offered to pay over to them the 10*l.* and exchange receipts. This offer was accepted by the petitioners, without objection at the time. The petitioners were now desirous of having the bill of costs taxed, and presented the common petition for a reference to the Master for that purpose.

Mr. Bethell and Mr. Dixon, for the petition.—This is not a payment of the bill by the clients. The solicitor had money

of his clients in hand, out of which he paid himself. The clients, therefore, are entitled to have the bill taxed in the usual way.

Mr. Simpkinson, contra.—It is not a matter of course for a client to have a bill taxed which has been settled without any pressure. Objectionable items must be stated in the petition—Horlock v. Smith (1).

LORD ABINGER, C.B.—I do not think this case falls within the principle laid down by the Lord Chancellor in the case cited. Here are parties trying to get from their solicitor what they can. They would not have had the 10*l.* without they had come to this settlement. Let there be the common order for taxation of costs, and reserve further directions.

C.B. }
June 3. } *Ex parte* NEWTON *re* THE
MANCHESTER AND BIRMINGHAM RAILWAY COMPANY.

Railway Company—Costs—Devises in Trust.

Trustees not allowed, as against a railway company, the costs of a duplicate conveyance rendered necessary by reason of the price of the purchased estate exceeding the amount paid into court by the company; nor the costs of exceptions allowed to the Master's report against the purchase.

The trustees, having no other fund, were allowed to take these extra costs out of the principal money in court, though some of those entitled in remainder were infants.

This was the petition of the tenant for life, and the devisees in trust under the will of N. Newton. A portion of the devised estates had been taken by the company, and the purchase-money paid into court. An estate had been contracted for by the trustees for a sum of money greater than the amount paid into court by 100*l.*, and it was agreed, that this 100*l.* should be secured on the property purchased at a perpetual rent-charge of 5*l.* per annum. Duplicates of the conveyance became necessary in consequence of this arrangement. The Master reported, that it was not a proper investment. Exceptions were taken

(1) 2 Myl. & Cr. 495; s.c. 6 Law J. Rep. (N.S.) Chanc. 236.

to that report, and allowed; but Alderson, B. thought that the petitioners were not entitled, as against the company, to the costs of the duplicate conveyance, or of the exceptions to the Master's report. The trustees, having no other monies in their hands to recoup themselves these extra costs, now applied to the Court, that they might be allowed to take these costs out of the corpus of the property, and to make up the further deficiency of the purchase-money occasioned thereby, by granting a rent-charge of 7*l.* 10*s.* instead of the 5*l.* Some of the parties beneficially interested under the will were infants, but those who were of age consented.

Mr. Simpkinson and Mr. Mylne, for the petition, contended, that these extra costs might well be considered as part of the price of the purchase, and, as such, ought to come out of the principal money.

Ordered as prayed.

C.B.
May 23, 29, }
& June 10. } CHAPPELL v. PURDAY.

Injunction — Copyright — Legal Title — Foreigner.

In 1830, A, a foreigner, assigned the entire copyright of a musical work to B, a foreigner. A. and B, by parol, assigned to C. the copyright for Great Britain and Ireland. In the same year, C. by parol assigned to D, who published the work in England. In 1834, E, denying the exclusive right of D, and being about to publish the same work, was induced by D. to desist upon certain terms. On the death of D, his executrix refused to continue the agreement with E, who then published the work on his own account. In 1836 the executrix obtained a legal assignment from A, B, & C, and then filed a bill against E. for an injunction, and an account. On a motion to dissolve an ex parte injunction obtained, the answer of the defendant was read, alleging, that from 1830 to 1836 the trade had freely imported the work in score from Paris, and that various parts had also been published here, without molestation by D, or his representatives, till the legal title was obtained by the plaintiff. The injunction was dissolved, and an action at law was directed as to this point,

whether a party who had a parol assignment of a work, but no legal title, and had permitted importation by the trade for six years, could, by obtaining the legal title afterwards, acquire the right of excluding others from the privilege of publication; the defendant to keep an account in the meantime.

A foreign author may communicate a copyright to a subject of this country for the time limited by the 8 Ann. c. 19.

Semble—A legal title in the plaintiff is not absolutely necessary for an injunction.

The bill stated, that in 1829 Auber composed the opera *Fra Diavolo*, and, before any publication of the work, contracted in December of that year with Trupenas, a music publisher of Paris, for the sale to him of the exclusive copyright of the work in France, Germany, Great Britain and Ireland. That on the 12th of January 1830, Auber and Trupenas, in consideration of 50*l.*, assigned to Latour the work as far as related to the copyright in Great Britain and Ireland. There was no deed of assignment, but a receipt was given for the consideration money as follows:—“London, 12th of January 1830. Received of — Latour 50*l.*, for the absolute sale of the copyright interest in *Fra Diavolo*, for the United Kingdom of Great Britain and Ireland.” Signed, Auber, Trupenas. On the same day Auber and Trupenas signed a memorandum in these words: “Whereas we have this day sold to Latour all our copyright interest in *Fra Diavolo*, and whereas 50*l.* has been paid to us by Latour; in consideration of the premises, we hereby for ourselves, &c. promise and engage to and with Latour, and his assigns, at his or their requests and costs, to execute a proper assignment of our interests.” This memorandum was attested by two witnesses. That in February 1830, Latour, in consideration of 50*l.* paid to him by Chappell, the testator of the plaintiff, sold his interest in the copyright to Chappell, but there was no regular assignment. That on the 9th of February 1830, Chappell published the work, and this was the first publication of the work in Great Britain, or in any other part of the world. That it was duly entered at Stationer's Hall. That many thousand copies were sold, and great profits made by Chappell, till his

death in December 1834. That the plaintiff was his executrix, and continued the sale of the work, and on the 2nd of June 1836, obtained a regular assignment from Auber, Trupenas, and Latour. On the printed copy were these words:—"N.B. This work is copyright." That notwithstanding this notice, the defendant published the overture arranged for the piano-forte, with accompaniments, and had sold some copies. Upon this statement in the bill, verified by affidavit, the *ex parte* injunction was obtained. It was now moved to dissolve that injunction. The answer of the defendant alleged, that the opera was publicly played in Paris on the 29th of January 1830, and that in the books of the office of the Minister of the Interior at Paris, was an entry dated the 11th of February 1830, as to a deposit by the publisher of *trois épreuves* of the said work, as required by the law of France, and the defendant insisted that this was an actual printing of the work in Paris, at the time of the deposit of these *trois épreuves*, and that the work, being the production of a foreigner, and being so printed in Paris, was not published in England till some months afterwards. That Auber and Trupenas were foreigners, as also Latour, who was resident in Paris. That such before-mentioned memorandum, if executed at all, was ante-dated; and that the defendant did not believe that the transaction between Latour and Chappell took place in February 1830, and that it was not true that Chappell published the work on the 9th of February 1830. That at Stationers' Hall there was an entry dated February 9, 1830, of the same work as published by Goulding & Co., and on the 15th of March 1830, the entry of the copy as published by Latour; and the defendant believed that Chappell did not publish his copy till that time. That the publication of Chappell was copied note for note from the publication of Trupenas, and contained the same mistakes and omissions. That several parts of the opera had been published in the *Harmonicon* in March 1830, and that previously to the death of Chappell, and afterwards, the opera had been imported by the trade, and sold without any molestation by Chappell or his representatives, till the alleged legal assignment in June 1836. That in 1834,

the defendant, believing that no copyright in the said work existed in these realms, employed "Kimbault" to adapt the music from the original score printed at Paris, for four instruments, but before publishing the same sent notice of his intention to Chappell, who twice called at his warehouse and requested him not to do so, and offered, if he would desist, to supply him with copies at 35 per cent. under the trade price; that on the occasion of those interviews, the defendant expressly denied that Chappell had any copyright, when Chappell admitted that he had not the legal property. That Chappell, in pursuance of the arrangement, supplied the defendant with about fifty copies, at the rate agreed upon, and after his death the plaintiff supplied him with thirty-five copies more, at the same rate, but afterwards refused to supply him with any more, except at the trade price; and that the defendant then published the arrangement which he had caused to be made by Kimbault.

Mr. Simpkinson and *Mr. O. Anderdon*, for the motion.—It is not contended, that in no case can a foreigner be entitled to copyright in this country; but there is no decision that a foreigner residing abroad, and publishing abroad, is entitled to copyright in this country, because it would be at variance with the 8 Ann. c. 19. s. 4; and the copyright acts in all cases were meant for the protection of the subject, and not for the protection of the foreigner.

[*LORD ABINGER, C.B.*—If a man imports a book from abroad, and first publishes it here, has he then the exclusive right?]

No. The act of the 1 & 2 Vict. c. 59. makes it clear, that up to the time of the passing of that act, foreigners had no protection, and that all the previous acts were for the benefit of British subjects only. *Clementi v. Walker* (1) is exactly similar to the present case. *D'Almaine v. Boosey* (2) merely decides, that it is competent to a foreigner coming to England, and not having previously published his work, to convey his interest therein to an English publisher. But, if the composition has been previously published abroad, no exclusive copyright can afterwards attach in this

(1) 2 B. & C. 861; s. c. 2 Law Rep. K.B. 176.

(2) 1 You. & Col. 289; s. c. 4 Law J. Rep. (N.S.) Exch. Eq. 21.

country—*Guichard v. Mori* (3). Besides, Chappell and the plaintiff have debarred themselves by their conduct from calling in the summary aid of the Court. In 1834, the defendant denied Chappell's right, and prepared to publish without any concealment, and only abstained in consequence of the arrangement that had been come to; and the plaintiff did not repudiate that arrangement till she obtained a legal assignment. In a case so doubtful, the Court will not continue the injunction, but direct the plaintiff to bring her action at law.

Mr. Girdlestone and Mr. Chandless, contra.—The first ground taken by the other side is, that this work was published abroad by a foreigner, before the plaintiff acquired her right, and before there was any assignment to satisfy the copyright acts. But this memorandum of January 1830 was attested, in the manner prescribed by the statute, by two witnesses.

[LORD ABINGER, C.B.—This agreement professes to have been executed in London; and, by the law of France, it is not valid, except it is attested by a notary.]

There is no allegation one way or the other, as to where it was executed. By that memorandum the transfer of the right was complete on the 12th of January 1830. The answer of the defendant is, that he was informed and believed that the opera was performed in Paris in January 1830 (performing an opera is no publication); and that by the deposit of the *trois épreuves*, it was published. Neither of these facts amount to an allegation of a previous publication. It is said, that the Court, where the case is doubtful, will send the plaintiff to law, and direct the defendant to keep an account in the meantime; but the Court will not dissolve the injunction, when it sees that the account will not do justice to the plaintiff. But it is said, that to obtain an injunction the legal title in the plaintiff must be clear: that is not so—*Universities of Oxford and Cambridge v. Richardson* (4), *Tonson v. Walker* (5), *Mawman v. Tegg* (6), *Colburn v. Duncombe* (7). In *Clementi v. Walker*, the principal argument

against the injunction was the great interval of time that had elapsed, and there the assignment was by parol. As to the plaintiff's conduct, the copy published by Chappell had these words on it, "this work is copyright," and the defendant purchased the work as copyright till 1841, and acquiesced in Chappell's title for six years at least.

Mr. Simpkinson, in reply.—The receipt and memorandum of January 12, 1830, did not constitute a valid and legal assignment—*Colburn v. Duncombe* is an express authority. But there was a publication before this agreement to assign to Latour.

[LORD ABINGER, C.B.—The depositing of the *trois épreuves* does not prove that, because it is merely done in compliance with the law.]

There is no instance of a court of equity interfering by injunction, where importation has been permitted, or publication—*Assignees of Robinson v. Wilkins* (8), *Platt v. Bulton* (9), *Rundell v. Murray* (10), *Sanders v. Smith* (11). As to clearness of the title—*Osborne v. Donaldson* (12), *Millar v. Taylor* (13). The Court will direct an action, and an account in the meantime—*The King v. Reed* (14), *Wilkins v. Aikin* (15), *Collard v. Allison* (16). If a foreigner residing abroad, by assigning his work to an English subject, can have the benefit of the 8 Anne, what was the necessity for passing the 1 & 2 Vict. c. 59?

LORD ABINGER, C.B.—[After stating the facts of the case, his Lordship proceeded as follows:—By these means Chappell obtained an equitable title to that which Trupenas originally purchased from the composer. Under this state of circumstances, the defendant, upon some contract with Chappell, became the purchaser of several copies of the work, at 35 per cent. under the trade price. After the death of Chappell, his widow in 1836 obtained a

(8) 8 Ves. 224, n.

(9) 19 Ibid. 447.

(10) Jac. 316.

(11) 3 Myl. & Cr. 711; s. c. 7 Law J. Rep. (N.S.) Chanc. 227.

(12) 2 Eden, 327.

(13) 4 Burr. 2303.

(14) 8 Ves. 223, n.

(15) 17 Ibid. 422.

(16) 4 Myl. & Cr. 487.

(3) 9 Law J. Rep. Chanc. 227.

(4) 6 Ves. 706.

(5) 3 Swanst. 672.

(6) 2 Russ. 385.

(7) 9 Sim. 151.

full legal assignment from all the parties who had professed to deal with the right. Then it is stated by the answer, and clearly enough to support an indictment for perjury, if untrue, that before the widow obtained her legal assignment, the score of the opera had been imported from France, and parts of it sold by music-sellers in this country, without any opposition on the part of Chappell, and that other parts in 1830 were published in the *Harmonicon*, without opposition by Chappell. Thus, before the plaintiff's testator had obtained any legal title, an importation and publication take place, and not till 1836 is the legal title acquired. The question then is, will a court of equity lend its aid to support an equitable title, where there has been a publication before the legal title is obtained? It is said, that a court of equity will not grant an injunction, except the legal title is vested in the plaintiff. If that is the dictum of Lord Mansfield, that a court of equity will only interfere where the legal right vests in the individual applying for protection, I am not disposed to go that length. It is clear, that a court of equity in no case will assist a party having a mere equitable right, against a party having a distinct legal right without fraud. A great deal of the argument used is not necessary to decide this case. It has been argued, whether the statute of Anne protects foreigners in any case, and *Bach v. Longman* (17) and *D'Almaine v. Boosey* were cited. That statute was intended for British subjects only, and does not throw its protection round a foreigner. But let us take the whole subject together. *Millar v. Taylor* was cited. I remember the great notice that case attracted, when I first entered the profession. The judgment, though delivered by Mr. Justice Willes, was well known to have been the composition of Lord Mansfield himself. Mr. Justice Yates objected, that an author had no common law right to his work after he had published it, though he had before. Lord Mansfield made a most successful reply, and said, as I think most truly, that if an author had a common law right at all in his work, he had the same as well before as after publication. In the case of

Donaldson v. Beckett (18), in the House of Lords, eight of the Judges were with Lord Mansfield upon the first point, that an author had a common law right before publication. There was a second question, whether an author, admitting that he had a right at common law, retained that right after publication. The majority of the Judges were of opinion, that he retained that right at common law, but that the statute had put an end to it; because, the statute giving a right of fourteen years and no longer, and in many parts recognizing the common law right, thereby limited the right to the time mentioned in the statute. A statute made for British subjects cannot affect the rights of foreigners at all. A foreigner, having a right by the law of his own country, might communicate that to a person in this country. Therefore, it appears to me clear, that a foreigner, who is the author of a work published in France, may communicate a partnership therein to an English subject, to all intents and purposes, at least for the period which the statute of Anne permits him to hold it. I see no difficulty whatever in allowing an injunction to restrain, if I did not consider the facts alleged in the defendant's answer sufficient to preclude me. I cannot say that it concludes Mrs. Chappell; that she has no need to ask the assistance of a court of equity, because she has the legal title. It appears to me a question of considerable doubt, and that she ought first to have this question decided at law. If she chooses to maintain her bill here she may. Though the case is not so strong as *Clementi v. Walker*, yet it is of the same nature. It is properly a question at law, whether a party who had before obtained the copy-right, but not obtained the legal title, and had permitted various music-sellers to import various parts of the opera, is afterwards at liberty to say she has acquired the right to prohibit any person to do it again; or, whether she has not given the public a right to resist that title. The question must be tried at law, whether Mrs. Chappell has any legal right; and the defendant must be directed to keep an account till that action can be tried.

Injunction dissolved.

(17) Cowp. 623.

(18) 2 Bro. P.C. 129.

ALDERSON, B. }
 May 12, 15; } DEARDON v. BAMFORD.
 June 30. }

Vendor and Purchaser—Specific Performance—Mistake—Professional Assistance.

Where the defendants (vendors) sign a contract of sale, without professional assistance, and the plaintiff (purchaser) is a solicitor, circumstances of evidence, generally leading to the notion of surprise or mistake, and objections, otherwise not decisive per se, will be sufficient to induce the Court to withhold a decree for specific performance.

Charles Bamford was the lessee for the residue of a term of years, of a mill called Hade's Mill, and was also together with his brother James Bamford, and John Taylor and his wife, interested in a freehold property adjacent to the mill, called Hade's Farm; and Charles Bamford and James Bamford were joint owners of another farm adjoining, called Stewart's Barn Farm. In November 1838, there were negotiations between the plaintiff (who was a solicitor) and C. Bamford, for the sale to the plaintiff of the mill. The terms of the sale were reduced into writing by the plaintiff, and submitted to Messrs. E. & S., the vendors' solicitors, who struck out some of the clauses, as giving too extensive rights of way to the plaintiff; in consequence of which the negotiation went off. The treaty for the purchase having been renewed, the parties met on the 21st of December 1838, on which day a contract for the sale of the premises was entered into, to the following effect: after reciting that C. Bamford was possessed of the mill, and was interested with the other parties in the adjacent estates, it was witnessed that C. Bamford agreed to sell, and the plaintiff agreed to purchase the mill for 450*l.*, and that Charles and James Bamford and John Taylor agreed to sell all such land in the Hade's Farm, as the plaintiff might require for "dams," at the rate of 60*l.* per acre; and Charles and James Bamford agreed to sell part of Stewart's Barn Farm, at the rate of 60*l.* per acre; and C. B. covenanted to produce a good title, and before the 29th of January 1839, upon the receipt of the purchase-money, to execute a conveyance; and the plaintiff agreed, for the considerations

aforesaid, to provide a more convenient watering-place for the farm. This agreement was executed by Charles and James Bamford, and John Taylor, and by the plaintiff, and was attested by Chadwick, J. Leach, and J. Lord.

The plaintiff was allowed to take possession of the property, and the land that he required in Hade's Farm, when complaints were made that he was taking more land than was necessary; and some correspondence passed on the subject. Afterwards the abstract of the title was delivered by Messrs. E. & S. on the 22nd of February 1839. The defendants then refused to perform the agreement, and the present bill for specific performance was filed on the 18th of April 1839. The answer of the defendants alleged, that the plaintiff came to the meeting of the 21st of December, with the draft agreement in his pocket; that during the discussion he made various alterations, by interlining it, and then induced the parties to sign it. That Charles Bamford then wished to take it to his solicitor, when the defendant exclaimed, "If there is anything wrong in it I will forfeit all my property." That the plaintiff put the agreement into his pocket, and took it to his own house. That it was understood by the vendors, that the plaintiff was only to take about half an acre of land in Hade's Farm, and was also to make an embankment on some land belonging to the plaintiff's brother, and grant a right of road thereon to the defendants from Hade's Farm to Stewart's Barn Farm, which right of road would increase the value of the farms by the amount of 200*l.*; and they insisted that the plaintiff misread the agreement to them, as if it contained such provisions; or, if he did not so misread it, he fraudulently omitted them. It appeared, that in the correspondence before and after the delivery of the abstract, no objection had been taken by the vendors, on the ground of the absence of the embankment clause, and that such objection was first raised by the answer, and the objection as to quantity of land was first noticed in a letter of Messrs. E. & S. to the plaintiff, on the 19th of February, in these words: "You stated you only required half an acre; we hope you do not mean to take advantage of the agreement, for the

purpose of taking more." On the same day the plaintiff returned an answer, repudiating the idea as to any limitation in the quantity; and after that, the abstract was delivered by Messrs. E. & S., together with a letter beginning in these words: "Relying upon the understanding between us, we forward you the abstract of title." Two of the attesting witnesses to the agreement, Chadwick and Leach, examined on the part of the plaintiff, deposed that they were present during the whole time of the meeting, and that no proposal was made as to the embankment; and that the land to be taken in Hade's Farm was to be so much as Chadwick might consider requisite for the purposes required; which Chadwick then stated would be nearly an acre. That the contract was deliberately read over to the vendors, who expressed themselves satisfied. Lord, the remaining attesting witness, and the tenant of the mill, examined by the defendants, deposed to some agreement as to the embankment, and also that the paper writing did not contain the whole terms of the contract.

Mr. Girdlestone and *Mr. K. Parker*, for the plaintiff.—Assuming there was something in the case made by the defendants, they have precluded themselves from taking the objection. With the knowledge that the plaintiff repudiated the agreement, as to the limitation of the quantity of land, the vendor's solicitor delivered the abstract of title. No claim is made as to the embankment and right of road prior to the answer; which proves that it is an afterthought. The circumstance of the plaintiff being a solicitor, and of there being no solicitor present on the other side, is no valid objection; but only imposes on the plaintiff more than ordinary care.

Mr. Simpkinson and *Mr. Rogers*, for the defendants.—An agreement of this description cannot be enforced. It purports to be attested by three witnesses, and is filled with all kinds of alterations, none of which are noticed in the attestation. There is nothing to shew that these alterations were made antecedent to the signature. The establishing of such a contract would let in all kinds of fraud. The defendants swear that the embankment was one of the considerations for agreeing to sell to the plaintiff part of the two farms, and

that it would make the farms worth 200*l.* more; and that the plaintiff read the agreement as containing such a clause. Besides, it is an agreement to sell certain property, and *Mrs. Taylor*, who is interested in that property, is no party to the agreement. Every agreement of which specific performance is sought, should be certain and fair in all its parts—*Underwood v. Hithcox* (1), *Malins v. Freeman* (2).

Mr. Girdlestone, in reply.—It is not a good defence on the part of the vendor, to say, he cannot perform the contract, if the purchaser is willing to take what he can convey. The interlineations, though not attested, do not constitute a valid objection *per se*.

[*ALDERSON, B.*—That question may be referred to the Master, to see if the agreement is in a state in which it can be executed.]

The whole objection is, that something is omitted. The conduct of the vendors before the delivery of the abstract, rebuts that supposition. The Court must exercise its discretion in favour of the plaintiff, unless the defendants can establish a case of circumvention.

June 30, 1841. — *ALDERSON, B.*—In a question of this kind, it is clear that the discretion of the Court is to be judicially exercised; and, according to the cases, if the defendant can shew circumstances of fraud, misrepresentation, surprise, or mistake, he does quite enough to prevent the Court making a decision against him, and the plaintiff is left to his action at law. The difficulty is to apply the principles to the particular case. The present agreement was not the first between the plaintiff and *Charles Bamford*. The previous one was repudiated by the legal advisers of that defendant, as containing clauses giving too extensive rights, which it required a legal understanding to see the effect of. The purchase went off; but, subsequently, the parties entered into a fresh negotiation, and finally the present agreement was signed by the defendants without legal advice, and it was prepared by the plaintiff alone. I cannot help thinking, particularly after the former agreement had gone off,

(1) 1 Ves. sen. 279.

(2) 2 Keen, 25; s. c. 6 Law J. Rep. (N.S.) Chanc. 133.

that the plaintiff should not have suffered the defendants to sign, without previously consulting their solicitor. It is true, that the defendants, unassisted by legal advice, were competent to enter into a binding agreement, yet they were very likely unable to comprehend the terms of it. If the other facts of the case lead to the notion of mistake, the absence of a legal adviser becomes material. In addition, there is the remarkable appearance of the agreement itself; the interlineations, of which the attestation takes no notice; the body of the agreement is in the writing of the plaintiff's clerk: all circumstances of consideration in weighing the evidence, though not *per se* decisive objections. The case of the defendants in their answer is, that there was an agreement to give an embankment to be made over the land of the plaintiff, whereby the farms would be of increased value. The attesting witnesses were examined; there is a discrepancy in their evidence; I am not disposed to think them guilty of perjury. There may have been words as to the embankment. The reason of the defendants' not mentioning it in the subsequent correspondence, may have been because at that time they had no doubt as to that, and the only dispute then was, as to the quantity of land. The whole difficulty arose from the absence of a legal adviser. There are remarkable circumstances to shew the want of care: the defendants have agreed to convey land in which another person is interested, and the plaintiff is said to have agreed to grant a road, which he could not do without the consent of his brother. It has been executed under such circumstances of mutual misapprehension, that it ought not to be enforced.

Bill dismissed, without costs.

ALDERSON, B. }
June 28, 30. } SNOWBALL v. DIXON.

Attachment—Irregularity—Return of the Writ.

A writ returnable immediately, means immediately after the caption; and the execution is not limited to any particular time; but, semble, it must be within a reasonable time. An attachment issued before an abatement of the original cause, is revived by the order to revive the suit.

On the 11th of May 1840, the plaintiff obtained the Master's certificate of the defendant Jane Dixon's default in not putting in her examination to certain interrogatories left in his office. On the 17th of June, an attachment was issued against Jane Dixon, returnable immediately, but the writ was not delivered out by the sheriff till the 15th of January 1841. The capture was effected on the 29th of the same month, and the defendant lodged in prison. It appeared, that after the issuing of the attachment, the suit abated, and the writ was executed after the revival of the suit.

This was a motion, that the prisoner might be discharged on the ground of irregularity in the process.

Mr. C. P. Cooper and Mr. Elderton, for the motion.—First, the attachment being dated on the 17th of June 1840, and being returnable immediately, could not be executed after the last day of the Michaelmas term following—1 *Smith's Chan. Prac.* 126. And, in this respect, the practice of the courts of common law, as to writs, is similar in principle. Secondly, according to the practice of courts of equity, it is incumbent, that the attachment should issue immediately after the Master's certificate of default; because, in the interval, it may happen that the examination has been put in—2 *Smith, 129*; 2 *Daniel's Chanc. Prac.* 285. Thirdly, the writ was issued in the original suit only. The plaintiff ought to have sued out a fresh writ in the original and revived suit.

June 30. — ALDERSON, B. — The first objection taken was, that the attachment was not issued in due time after the report. But the order was in due time, and there is no suggestion that the defendant has, as yet, put in her answer. The second objection was, that the time for executing the writ was run out. The writ was returnable immediately: that means, immediately after the execution of the writ. I cannot find any rule of court limiting the time, and I do not think the time was unreasonable under the circumstances of this case. As to the third objection, the order to revive, revives the attachment.

Motion refused, with costs.

ALDERSON, B.

Dec. 1839.

Feb.; April;

May; June;

July, 1840.

Jan. 8, 1841.

KNIGHT v. THE MARQUIS
OF WATERFORD.

Tithes—Pleading—Double Prescription—Unreasonableness—Presumption—Evidence—Entries in Steward's Books.

To a bill by the rector of F, for an account of tithes, against the lord of the manor of F, and his tenants, the defence set up was, that the manor of F. was situate in the parish of F, and that from time immemorial there had been payable and paid by the owner of the manor of F. to the rector, the sum of 40*l.* annually, by two equal payments, at Lady-day and Michaelmas, in lieu of all tithes; and further, that from time immemorial, the owner of the manor of F, "or his assigns," had been accustomed to have, and in respect of the sum so paid to the rector ought to have the tenth of all titheable matters arising within the manor:—Held, that this was a double prescription, the first branch being the assertion of an ordinary district modus, which, if it could be established in point of fact, would not be vitiated by the addition of the second branch; but that the evidence in this case contradicted the modus, the receipt of tithes in kind by any one being inconsistent with a modus in lieu of tithes.

Also, that it was very doubtful whether a prescription for the lord of the manor, or the proprietor of lands, "or his assigns," to take tithes from the terre-tenants, in consideration of a money payment to the rector, could be sustained, as none of the cases had carried the doctrine to that length; and also, on the ground of inconvenience, as, in case of alienation of the tithes by the lord, the rector might be left without remedy for the recovery of the money payment.

The gross absurdity of the presumed bargain between the church and the lord, (as also the rankness of a modus,) is not, strictly speaking, an objection in point of law, but a circumstance of fact, to be used as a criterion in judging of the rest of the evidence.

The defendant, in support of his double prescription, produced receipts from the rectors for this money payment, almost continuously from 1690 to 1822; and by the evidence in some old suits by former rectors,

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it was proved that such a payment had existed before 1690. In some of these receipts, the payment was called a "modus or sayson," in others "customary rent;" and in some it was described as paid for the estate of the person paying it, in the parish of F, and in others for the lordship of F. A great number of deeds was also produced, from 1642, shewing that the lord of the manor had been in the habit of dealing with the tithes as his inheritance; and it appeared, that the lord had always taken the tithes of the manor, and the rectors had never taken tithes from the manor, except for a district called C, which was aliened by the then lord in 1640, and had ever since paid tithes to the rector. But contrà, it appeared from the receipts, that the periods of the payments had varied; and it was proved in the old suits, that the amount had at times varied, and that the rectors giving such receipts were mostly under general bonds of resignation, and the claim made by the answer and the evidence in the earliest suit, went to all the lord's lands in the parish of F:—Held, that these facts, coupled with the wording of the receipts, the claim made by the answer in the earliest suit, and the evidence in support thereof, and the fact of the district of C. paying tithes immediately after its alienation, led to the presumption that the 40*l.* was really paid as a compensation for the tithes of the estate of the person paying it, however circumstanced, if situate in the parish of F; and pointed rather to a lease continually renewed as the origin of the claim; and that as the prescription set up was of a very improbable nature, it required very clear proof to sustain it, and that consequently the account of tithes ought to be decreed.

A. sets up a modus for the manor of F, of which he alleges H. to be a part. If H. is proved not to be a part of the manor, still the modus may be good pro tanto.

A fine will not operate upon tithes while they remain spiritual.

Entries in a steward's book in his favour, not referring to, or necessary to explain entries against him, will not be evidence of such facts; even though, at the end of the account, a balance is struck of all the items, which balance is against the steward.

This was a bill for an account of tithes by the rector of the parish of Ford, in the

county of Northumberland, against the Marquis of Waterford and — Askew, and their tenants, as owners and occupiers of certain lands within the said parish. The parish comprised two manors, Ford and Etal. The last had always paid tithes in kind. The lands out of which the rector claimed tithes, were all situated within the manor, or reputed manor, of Ford, which contained about 8,000 acres, and, according to the answer, was divided into the several districts of Crookham, Kymerston, Heatherslaw, Catfordlaw, and Ford. In 1640, Catfordlaw was sold by the ancestors of the Marquis to the owners of Etal, and since that time had always paid tithes in kind to the rector.

The defence was as follows:—That the parish of Ford, mentioned in the said bill, is a rectory, and comprises within its bounds or precincts (among other lands) the manor of Ford, and that the said manor of Ford has always, as the defendants believe, from time whereof the memory of man is not to the contrary, contained within its boundaries upwards of 8,000 acres of land, &c., and produces, as these defendants believe, an annual rental of 10,000*l.* and upwards; that the whole of the said 8,000 acres of land contained in the said manor of Ford has always been from time whereof the memory of man is not to the contrary, and is now, situate, &c. within the parish of Ford; and that from time whereof the memory of man is not to the contrary, there has been, as these defendants believe, always payable by the owner of the said manor of Ford, for the time being, and such owner for the time being has, as these defendants believe, always, until the time hereinafter mentioned in that behalf, paid in equal proportions, at two days or times in the year, that is to say, at Lady-day and Michaelmas-day, in each year, or so soon after as the same was demanded, to the parson of the said parish of Ford, for the time being, the yearly sum of 40*l.* for maintenance of divine service there, for and in lieu and contentation of all manner of tithes arising, &c. within the said manor of Ford; and that the owner of the said manor of Ford, for the time being, or his assigns, has, as these defendants believe, always, from time whereof the memory of man is not to the contrary, used, in respect

of the said yearly sum of 40*l.* so paid to the said parson of the said parish, to have, and of right ought to have, the tenth of all manner of titheable things arising, &c. within the said manor of Ford, or any part thereof.

The evidence in support of the defence was, first, deeds shewing dealings by the lord with the land and tithes, and with the tithes alone.

Kymerston. 2nd of July 1624—Carr, lord of the manor, to Selby, mortgage of the tithes of Kymerston; several transfers of that mortgage. 1670—bargain and sale by John Carr and Sarah, his wife, to William Carr, of one-third part of the tithes of Kymerston. 1684—Archbold to Bingham, mortgage of the tithes of Kymerston. 9th of February 1739—grant of an annuity charged on the lands and tithes in Kymerston. 1751—indenture of fine of tithes in Kymerston. 1777—lease and release of a moiety of the tithes in Kymerston, to make a tenant to the præcipe to suffer a recovery to the use of — Delaval, and recovery suffered in Easter term, 17 Geo. 3. And various leases of lands and tithes, and of the tithes alone, by the successive lords.

Crookham. 1633—Few to Archbold and wife, conveyance of the tithes of Crookham. 9th of October 1657—grant of an annuity to Banister, charged on land and tithes in Crookham. 1743—Delaval to Wood, conveyance of lands and tithes in Crookham. 9th of October 1657—lease to Simpson and Nicholson, of Crookham demesne, and all tithes belonging thereto. 1661—Ratcliffe to Nicholson, lease of lands in Broomreigh and Fordwood, with the tithes, large and small, and all oblations, obventions, &c. 1685—agreement for a lease of the tithes of Crookham. 1700—Blake and Carr to Young, lease of lands and tithes in Crookham. This lease was attested by Chalmers, the rector; and various other leases.

Generally of the manor of Ford. June 1639—common recovery suffered by Thomas Carr and his wife, of the manor of Ford, and of all tithes in the manor of Ford. January 1756—F. B. Delaval to John Delaval, demise of the castle and manor and tithes of Ford. 1761—F. B. Delaval and John Delaval to Thomas De-

laval, conveyance of the manor of Ford and the tithes. 1761—J. H. Delaval to Biscoe, demise of the lands and tithes of Ford. 1771—F. B. Delaval to J. H. Delaval, grant of an annuity of 2,500*l.* out of the manor and tithes of Ford. 1681—Blake to Browning, lease of land and tithes in Ford. 1694—lease of a moiety of the lands and tithes in Flodden, Heatherslaw. 1751—Blake to Thompson, lease of tithes in Heatherslaw and Flodden; and many similar leases. 2nd of May 1655—Carr to Radcliffe, feoffment of land in Broomreigh and Ford, with the tithes.

Receipts by the successive rectors of yearly and half-yearly payments of the 40*l.*, in lieu of tithes. The successive incumbents held the living as follows:—Selby to 1616; Rotherham to 1631; Edminstone to 1641; Pringle to 1660; Scott to 1676; Davidson to 1689; Chalmers to 1722; Marsh to 1760; Marsh (the son) to 1795; Wirkman to 1811; James to 1819; Knight, the present incumbent.

1690—"I, George Chalmers, rector of Ford, do grant me to have received of Sir Francis Blake 20*l.*, in full payment for a half year from Martinmas, 1689, to Whit Sunday, 1690, for all manner of tithes for the lordship of Ford. (Signed) George Chalmers." 1694—Release by the said George Chalmers, upon a settlement of accounts, wherein he owns himself fully satisfied, and acknowledges his "modus or sayson," for Ford lordship, and that he was fully satisfied. 1700, 1702, 1704—similar receipts for a two years' payment. 7th of October 1730—"Received of F. B. Delaval, by the hands of J. Blenkinsop, the sum of 20*l.*, being for half a year, due Midsummer, 1729, as the *customary rent for the tithes of his estate* in the parish of Ford, and payable to me, as rector of the said parish. George Marsh." April 1761—receipt by George Marsh, jun., rector, for 20*l.*, for a half year's rent in lieu of tithes. 1761—receipt of George Marsh, jun., for 20*l.*, for the "ancient modus," &c. within the *lordship* of Ford. April 1762—receipt for half a year's payment for the "ancient modus," in the *parish* of Ford. August 1811—receipt by James, the rector, for half a year's payment of an "ancient modus," which term is kept up.

in the receipts till 1822, when the present rector refused any longer to receive it. Certain bills from 1722, shewing that the lord had repaired the chancel of Ford Church, and also receipts for the land-tax, church-cess, and poor-rate charged on the tithes in the hands of the lord.

The decree, bill, answer, and certain depositions in the cause of *Davidson v. Blake*, which bill was filed in 1676. This was a bill by the rector of Ford, against the lord and his tenants, for an account of tithes, &c. and for the cancellation of a resignation bond, which the rector had given up, on the understanding that it should only be used to enforce his residence, but which had been put in suit upon the rector's demanding tithes in kind. The defendant, by his answer, admitted the bond, and stated that it was put in suit, because the rector had accepted another living in Kent, and the defendant claimed a *modus decimandi* for *all his lands in the parish* of Ford. It appeared that the plaintiff did not examine any witnesses, and the suit was never brought to a hearing.

Decree, bill, answer, and depositions for the defendant in *Jenkins v. Blake*. The bill was filed in 1683, and the decree was made in 1686. The bill stated, that the plaintiff was the owner of eight and a half farms in Crookham and Heatherslaw, and that Davidson, the rector, demised to him all the tithes thereon for eleven years, at a rent of 26*l.* per annum, and that Davidson covenanted for his title to the tithes, but that, notwithstanding, Blake came, and with violence took possession of the tithes. The bill prayed to have the lease confirmed. Blake, by his answer, insisted upon the immemorial payment of 40*l.* a year. Davidson, by his answer, alleged, that he did not believe there was any modus, but denied that he had told the plaintiff that he had a good title, but he alleged that he had told him he must struggle through as well as he could. Evidence was entered into, the cause heard, and the bill dismissed without costs.

The general effect of the evidence on the part of the defendants was, that tithes in kind had never been taken by the rector, but that 40*l.* yearly was paid to him by the lord, who himself took the tithes, or let them out to his tenants; that Etal and

Catfordlaw, from the time of the purchase thereof by the Carrs of Etal, paid tithes in kind; that 6s. 8d. was always paid to the lord for breaking ground in the chancel of the church. There was also evidence of reputation, carried far back, that the manor of Ford was discharged from the payment of tithes in kind, by the payment of an annual stipend to the rector.

Terriers—The terrier of 1792, signed by George Marsh, the son, and the churchwardens, described the profits of the parson to consist (among other things) of the tithes of the lordship of Etal, and of 40*l.* for the lordship of Ford, in lieu of tithes, the lord repairing the chancel, and of other small offerings.

Terrier of 1806, in similar terms, signed by Wirkman, the rector, and the churchwardens.

Court rolls from 1658, to shew the extent of the manor, the different districts or townships, and the names of the successive lords, Carr, Blake, Delaval, and the Marquis of Waterford. In the court roll of 1658, the different districts were enumerated, as Crookham West Field, Crookham, Catfordlaw, Ford, Ford Wood, Broomreigh, Heatherslaw, and Kymerton.

Déeds shewing the manner in which Catfordlaw, part of the manor of Ford, was in 1640 conveyed in fee, with all the tithes, minerals, &c. to Robert Carr, of Etal.

Fine—Final concord of a fine levied in Hilary term, 2 Geo. 3, by Sir F. B. Delaval and his son, of the rectory of Ford, and of all manner of tithes, oblations, and obventions in the parish of Ford.

Steward's books—The entries in the steward's books were then tendered by the defendants, wherein the steward, after charging himself on one side of the book with 30*l.*, as received from W. F. for the corn and petty tithes of H, had made an entry on the opposite side of 13*s.*, as allowed to W. F. for the land-tax and poor-rate on the said tithe; and after various receipts and allowances of the same kind, had, at the end of the account, charged himself with a balance of —*l.*

The counsel for the defendants contended, that as the ultimate balance being against the steward, was evidence, so the various items, out of which it arose, must

also be evidence as having all that probability that a court of justice required, and

Stead v. Heaton, 4 Term Rep. 669.

Bullen v. Michel, 2 Price, 413.

Williams v. Geaves, 8 Car. & Pay. 592.

Doe d. Lord Teynham v. Tyler, 6 Bing.

561; s. c. 8 Law J. Rep. C.P. 222.

were cited.

ALDERSON, B.—The two items here are not connected by a reference the one to the other, or by one being necessary to explain the other, but they are simple statements of two particular facts. *Stead v. Heaton* went very far: both Lord Eldon and the Court of Exchequer lamented that the doctrine had been carried so far. I should be sorry to make a precedent for carrying that doctrine further. This evidence must be rejected.

The evidence adduced on the part of the plaintiff, was as follows:—Ancient valuations of the rectory, inconsistent with the prescription set up. 39 Hen. 3. (1257) —*Inquisitio post mortem* of Isabella de Ford, stating, that she had, among other things, "the advowson of the church of Ford, which was worth 60 marks." Pope Nicholas' taxation (1291) of the diocese of Durham, "Ford Rectory, 180 marks" (86*l.* 13*s.* 4*d.*) 11 Edw. 2, 12th of June —A writ for a new taxation arising out of the mischief done by the Scots, *nova taxatio* in consequence, and Ford returned *nulla bona*. 1320—Mandate to collect according to the new taxation. 1322—Documents directing a two years' levy. 1380—Mandate for the taxation of benefices, and return, stating that, among other parishes, Ford was unable to pay. 1408—Mandate to levy a certain sum for the expenses of the deputies to the council of Pisa, Rectory of Ford valued at 20*l.* 1410 —Further mandate. Ecclesiastical survey, 26 Hen. 8. (1532), in which Ford is valued "in all profits at 24*l.*" Parliamentary survey 1650, "the parish of Ford is a parsonage, Mr. J. Pringle serveth the cure there, and hath paid him yearly by the patron three score pounds, the parsonage being of the value of 250*l.* Secondly, documents relating to the manor of Ford, in all of which, tithes are never mentioned. *Inquisitio post mortem* of Isabella de Ford, stated above. 12 Edw. 2. (1318)—Plea

of Mary, widow of William Heron, claiming her third turn to present to the church of Ford, in right of her dower. 14 Edw. 3. (1341)—Final concord of fine *sur droit*, &c. of the manor and advowson of Ford, between William de Middleton, parson of Ford, and William, son of Roger Heron, and Isabella his wife. 6 Hen. 6. (1427)—*Inquisitio post mortem* of William Heron, finds that he was seised of the castle of Ford, and the advowson of the church of Ford, and two-thirds of the manor. 18 Hen. 6. (1440)—*Amoveas manus*. 28 Hen. 8. (1537)—*Inquisitio post mortem* of William Heron. 29 Hen. 8.—Extent on the lands of William Heron, deceased. Thirdly, documents shewing that Heatherslaw and Ford were once separate manors. Entries 34 Hen. 3.—Robert de Muschamp holds in *capite* twenty-four and a half places (manors), and among them, are "Ford, Hethal, Crucum, Hederslaw, Kymarston; and of the same Robert de Muschamp holds Odinell de Ford, Ford, Crucum, Kymarston, and Hethal, for one fee of old feoffment; and his heir Odinell the younger, holds Hederslaw in frank marriage." Inquisition on the death of Isabella de Ford, (daughter of the said Robert de Muschamp,) in which she is stated to have the profits of a beadlery and other possessions in Hederslaw, held of the king *in capite*; and also to hold of W. de H, Ford, Crucum, and Kymarston, by the service of one knight, &c. Inquisition on the death of William Heron, 6 Hen. 6. (1427), in which he is stated to have been possessed of the castle of Ford, and two parts of the manor of Ford, the advowson of Ford, and the hamlet of Kymarston, and of two parts (*i. e.* a moiety) of the manor of Heatherslaw. Fourthly, an old registry from the registry office of the Bishop of Durham, in which was an entry of an order for sequestration of the estate of the late rector, for not having done the necessary repairs to the chancel of Ford Church. [This book was objected to by the other side, in consequence of its appearing by a note in the fly-leaf, that it had been removed from Durham during the rebellion (1650), and had subsequently come into the hands of Sir Thomas Bodley, and by the trustees of the Bodleian Library was restored to its original keeping.]

Fifthly, 14 Car. 2.—Action under the statute for tithes, by Scott, the rector of Ford, against Sir Robert Carr, of Etal, and judgment for the plaintiff. 1675—Release by Scott to William Carr of Etal, Francis Blake, of Ford, and all other the tenants of Ford, from all demands in respect of tithes, in consideration of 500*l.* The testimony of W. Carr, in *Jenkins v. Blake*, that after the action, an agreement was come to by the deponent and Blake with Scott, for a settlement upon these terms, that Scott should have 500*l.* for his arrears of tithes, and that of that sum, he, William Carr, was to contribute 166*l.* 13*s.* 4*d.* for Etal and Catfordlaw; and further, that he had never heard of a *modus* for Ford. The evidence of Pringle (rector till the restoration) in the same suit, that during all the time of his remembrance, there never was any constant custom or *modus decimandi* in the rectory. The will of Edminstone (1646), wherein he states, that his stipend for serving the cure was 30*l.* a year, and bequeaths several years' arrears thereof, due to him, to his niece. The evidence of Alexander Davidson, (the father of Davidson, the rector of Ford,) that he had known the rectory of Ford for forty years; that no certain sum was paid, but that the lord often constrained the parson to take what stipend he pleased.

Mr. Boteler, for the plaintiff, shortly stated the case, and relied upon the common law right of the parson.

The Solicitor General, Mr. Swanston, and *Mr. Purvis*, for the defendant, the Marquis of Waterford.—This is not a question of the discharge of the land from tithes, but who is entitled to them. The case on the part of the defendant is this, that for a long period of time, there has been a constant payment by the lord of Ford, of 40*l.* a year to the rector, and a constant perception of tithes by the lord of the manor. It appears, that, from 1585, the castle of Ford was thrice sacked in the border wars, and so the records were often destroyed; yet there still exists from early times a succession of deeds in almost every variety of form, in which these tithes, either separately, or in conjunction with the land, have been made the subject of fine, conveyance, mortgage, and lease.

Next, there are receipts from a succession of rectors from the year 1690, for the payment of the annual stipend, and a perception of the tithes of the manor by the lord. There is also evidence that the lords of the manor repaired the chancel of the church. All this evidence is to be coupled with the cause of *Jenkins v. Blake*, which was a hostile suit. The evidence in that suit was taken in 1684, and the fair result of that evidence is, that a specific sum of money was paid time out of mind to the rector, though some of the witnesses are unable to speak to the precise amount. Regard must be had to the length of time covered by this evidence. The witnesses were persons of great age; they speak to the whole period of their recollection, and also as to the reputation in the parish, of persons older than themselves; thus carrying the custom at least to the year 1560. No evidence was given of a suspension of these payments, or that tithes were ever taken in kind by the rector. Upon this evidence, that bill was dismissed in 1686. From all these circumstances, what other natural presumption is there, but that the lord of the manor, being the patron of the living, at some ancient period, being desirous of securing to the parish the benefit of a resident clergyman, gave to the rector 40*l.* a year, himself taking the tithes? A sum of money given under such circumstances, cannot be measured with an ordinary modus. At the time when the bargain was made, it might have had no relation to the precise pecuniary value, for men were then in the habit of giving all their property to the church. Regard must also be had to the relation in which the parties stood to each other, and to the locality, continually subject to hostile incursions, and to great destruction of property, often leaving the parson no sufficient maintenance. When this is followed by a long course of enjoyment on the part of the lord, marked by a course of hostility on the other side, it would be injustice, if the law were not to sustain such a claim as this. The terms of the receipts given by the rectors, are ambiguous. The sum is sometimes called "a modus," sometimes "customary rent," but in point of fact, the 40*l.* is the purchase-money for the tithes, which do not now belong to the rector,

but to the lord. The claim, upon the present record, is the same as that in *Pigot v. Heron* (1). A distinction is taken in that case between tenths and tithes: when paid to a layman, they are called tenths, or the tenth garb; when paid to an ecclesiastical person, tithes.

[ALDERSON, B.—The decision there is simply, that a *modus decimandi* for the whole of a manor is good.]

The inference from that case is, that the lord of a manor may, by prescription, in consideration of an annual payment to the rector, be entitled to the tithes in kind. *Pigot v. Sympton* (2) is very applicable to the present case, for it is there said to be a reasonable prescription.

[ALDERSON, B.—How can you prescribe to take the tenth sheaf, when you have a right to the whole? Unless the lord has them as "tithes," he has nothing.]

The principle of the last case was recognized in—

The Bishop of Winchester's case, 2 Rep. 45; s. c. as *Wright v. Wright*, 1 Eag. & You. 119; and in—

Dykes v. Thompson, 1 Wood, 513; s. c. 1 Eag. & You. 692;

which case establishes the validity of the transaction, whether a modus or not; and the decree there was, that the lord of the manor was entitled to the tithes.

[ALDERSON, B.—As between you and the rector, it is a mere modus, but in order to reconcile the evidence, recourse must be had to prescription: and there is the difficulty.]

Before the disabling statutes, it was competent to the rector to make such a bargain with the lord. There being then a probability of legal origin, the Court will make every presumption in favour of the lord's title, there being no evidence of perception of tithes by the rector, but, on the contrary, a long course of enjoyment by the lord—*Scott v. Airey* (3), where the distinction is taken between mere non-payment, and a pernaney of tithes by the lord.

Strutt v. Baker, 2 Ves. jun. 625.

Williams v. Bacon, 3 Eag. & You. 1105.

Bacon v. Williams, 3 Russ. 525.

(1) Cro. Eliz. 599; s. c. 1 Eag. & You. 135.

(2) 1 Eag. & You. 148.

(3) 3 Ibid. 342.

Norbury v. Meade, 3 Bligh, 211, and the observations of Lords Redesdale and Eldon, in pp. 240, 254.

[ALDERSON, B.—*Scott v. Airey* was a question as to a "portion" of tithes. Now that I understand to be where the tithes did not belong to the church, but to some particular person, that is, they never were in the church.]

[*Mr. Boteler*.—That is Lord Coke's definition.]

[ALDERSON, B.—Wherever no tithe has been paid, I will presume no tithe to be due; but here is a payment in lieu of tithe.]

That sum was the consideration money for the purchase of the tithe; and such purchase might have taken place, as supposed by Willes, J. in *Musgrave v. Cave* (4). Suppose a spiritual person lord of a manor, and before the time of legal memory, to have been in the habit of granting away the lands, reserving the tithes, and afterwards to grant the lands, reserving a rent of 40*l.* a year: the tithes would pass to the grantee, as appurtenant to the manor. The evidence of usage goes very far back. In 1624, there is a mortgage of the tithes alone of Kymerston, and the mortgagee in that case must have had evidence of a long course of enjoyment by the lord, before he would have lent his money upon them. The usage so evidenced, is confirmed by the decree of 1688; and under the faith of that decree, the Askews in 1760 and 1768, purchased part of the property in the manor, together with the tithes; and in the conveyance, the covenant of indemnity is not against the acts of the rectors of Ford, but only against the acts of the vendors, and those claiming under them, and against default in payment of the 40*l.* to the rectors.

[ALDERSON, B.—They seem by that to have thought, that if the stipend was not paid, the rector's right to tithes would revive, and that is inconsistent with your notion of a grant.]

But even if the Court should be adverse on the previous point, the rector is still bound by the fines of the 2 Geo. 3. and 11 Geo. 3. We submit, that the fine would take effect against the rector, subject to his right of entry, within five years; if he

omitted to enter within the time, he would be personally barred; but his successor would not, except he also suffered the time to elapse.

1 *Prest. on Conv.* 235.

2 *Plowden*, 538.

Runcorn v. Doe, 5 B. & C. 696; s. c.

4 Law J. Rep. K.B. 281.

The defence set up here, is a modus, coupled with the fact of taking the tithe. In such a defence, none of the cases have decreed tithes, and in nearly the whole, has a trial been refused. In *Bacon v. Williams*, a trial was directed. In the case of a simple modus, the Court will be guided by considerations as to length of time in sending the case to a trial.

Chapman v. Smith, 2 Eag. & You. 141.

Jee v. Hockley, 3 *ibid.* 817.

Bree v. Beck, 1 You. 211.

Dent v. Rob. 1 You. & Col. 1.

In *Berney v. Harvey* (5), Lord Eldon, taking a distinction between a defence *de non decimando*, and pernancy of tithes by a layman, observes, that where there was no other proof but pernancy for a great length of time, yet there should be a presumption of a legal origin of title, that a mere retainer unexplained, would not raise the presumption of title, and the case would not be sent to law; but if it appeared that the defendant had lands that had never paid tithes, it was a good ground for sending it to law. In *Hughes v. Davies* (6), the bill was retained for twelve months, to give the plaintiff an opportunity of trying his right at law. In *Bacon v. Williams*, the feeling of Lord Lyndhurst was, that it was a pure legal question. It is contended, therefore, that the utmost relief the plaintiff will have from the Court is, that he shall have liberty to proceed at law.

Mr. Girdlestone, for the defendants, the Askews.—The claim of these defendants is, to take the tithes of their lands in the manor of Ford, as a lay fee, separate and distinct from the lands themselves, under a title which was derived from an ancient grant by the rectors, not, indeed, produced or proved in evidence, but to be presumed from the great lapse of time and the mode of dealing with the tithes;

(4) Willes, 326.

(5) 17 Ves. 119.

(6) 5 Sim. 331.

that grant being made in consideration of a payment by the lord of the manor to the rector, of an annual sum of 40*l*. These defendants are purchasers of the tithes from the ancestors of the Marquis of Waterford, for valuable consideration. The Court cannot presume that a lease was the origin of the modus set up, for that supposes a succession of leases, of which there is no evidence, and also that each successive incumbent was in a state of ignorance and mistake. The Court, if possible, as the lords of the manor have always treated the tithes as an estate of inheritance, will make a supposition in favour of a lawful origin. Generally speaking, a layman cannot prescribe for tithes, unless he bases his title on some grant from a spiritual person subsequent to the time of legal memory; but even antecedently to the time of legal memory, he might do what he pleased with his tithes—*Slade v. Drake* (7). The principle holds, whether it is considered as the right of the lord simply to be discharged of tithes, or whether he claims the right to hold the tithes, as a distinct inheritance from the land. In the last supposed case, there will be no merger, for tithes are spiritual, and cannot be parcel of a manor.

Sherwood v. Winchcombe, 1 Gwill. 164; s. c. 1 Eag. & You. 106.

The Bishop of Winchester's case, *ibid.* 167; and Lord Coke's argument, p. 181.

This doctrine is confirmed by—

Philips v. Prytherick, 3 Gwill. 1125.

Pigot v. Sympton, (*supra*).

In such a case, great weight has always been given to lapse of time. See the judgment of Macdonald, C.B., in *Atkins v. Lord Willoughby de Brooke* (8), and the observations of the Lord Chancellor in *Wynniatt v. Lindow* (9). What is the probability of the evidence? There are receipts of the successive rectors for the stipend of 40*l*., from 1690 to 1822. The little variations in the forms of those receipts, are immaterial—*Chapman v. Smith* (10). During that time, there is positive proof that no

tithes were paid to the rector, and proof that tithes were paid to the lord up to the time when Pallingsbourne was sold to these defendants. The fines are, at all events, a good answer to the present plaintiff's claim, and need not be pleaded—*Davies v. Lowndes* (11).

Mr. Boteler, Mr. Simpkinson, and Mr. Lowndes, for the plaintiff.—Before entering on the merits of the case, there are some preliminary objections as to the manner in which the prescription is stated. First, that it is not warranted by the cases cited; secondly, that the whole recompense to the rector is not stated as it ought to be; thirdly, that the discharge from tithes is stated too largely; and, from the whole of the evidence, it is not possible that any such prescription could have existed for three centuries; and, that the prescription had its origin in oppressive conduct on the part of the lord. As to the first point—the defence set up in the cases cited, was, that “the lord of the manor, or those whose estate he hath, have taken the tithes;” here, it is the lord of the manor or his “assigns.” The defendants rest their case on the lord's power of assignment. This is a substantial variance. The cases establish this—that the lord of a manor may prescribe to pay an annual sum in satisfaction of tithes, and that he and all who have his estate, are entitled to receive the tenth garb of the manor; and the cases also establish, that whether it is called tenth garb or tithe, in either case it is something that may exist in the hands of the lord, even as arising out of his own lands. In *Pigot v. Heron*, Lord Coke distinctly considers it to be tithe, and that it may be sued for in the spiritual court; and in the explanation given in *Pigot v. Sympton*, it is said to be “a reasonable prescription,” for he had them before by retainer, and now he has them in pernaney. This is a strong argument, that the tithe remained spiritual: how else could they be sued for in the spiritual court? If not spiritual, they would have merged in the ownership. If not spiritual, they could only be the subject of an action in the temporal courts—*Degge*, part 2,

(7) Hob. 297.

(8) 2 Anst. 397.

(9) 8 Law J. Rep. (N.S.) Chanc. 121.

(10) 2 Ves. sen. 506.

(11) 1 Bing. N.C. 597; s. c. 4 Law J. Rep. (N.S.) C.P. 215.

c. 16, *Dykes v. Thompson, Phillips v. Prytherick*. In none of the deeds is anything else conveyed, except under the name of tithes. If they are then spiritual, this difficulty arises: suppose the lord parts with them; they become tithes in gross. That is a fatal objection. They assert in the defence a right to sever them. A layman cannot prescribe for tithes in gross. In such a case, what is the rector's remedy for the 40*l.*? He would be in a worse situation under this prescription than under that warranted by the cases. He could not distraint upon the tithe, for the lord has parted with it. Again, the prescription is said to be in lieu of all tithes, but the terriers and other evidence speak of the parson as entitled to certain small tithes and offerings. Again, the whole recompense is not stated, for part of the recompense to the rector is, that the lord should repair the chancel. As to the general merits of the case, the plaintiff produces various ancient documents, open to no suspicion, inconsistent with the usage asserted; and also, during the proceedings in the time of Car. 2. and Jac. 2, and during this long acquiescence, as it is called, a series of oppressions on the part of the lord and his agents, that will make it impossible for the Court to sustain this prescription. First, they produce an ancient valuation of the church of Ford, wholly at variance with the theory of the other side, and shewing that the rector was wholly without this pretended payment during the incursions of the Scots; for all the ancient taxations of benefices from the time of Edw. 2, included payments in lieu of tithes, as well as tithes themselves, and yet Ford is returned *nulla bona*, or as too impoverished to pay. In the ecclesiastical survey, Ford is valued in all profits at 24*l.* In the parliamentary survey, the lord is stated to pay the rector three score pounds. Secondly, all the old documents relating to the value of the manor, the inquisitions, extents, &c., though they speak of the advowson and rectory, never mention the tithes of Ford as parcel of the inheritance or as appurtenant to the manor. Thirdly, documents are produced to shew that Heatherslaw and Ford were once separate manors. In the entry in the 34 Hen. 3, R. de Muschamp is stated to hold twenty-

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four and a half places *in capite*, and among them are enumerated Ford, Hederslaw, &c. In the inquisition upon the death of Isabella de Ford, the terms on which Hederslaw is spoken of, import a manor. In the inquisition upon the death of W. Heron (1427), Ford and Heatherslaw are expressly mentioned as two distinct manors. The evidence for the prescription in Heatherslaw, is as good as for any other part of the manor; if it fails for Heatherslaw, it must fail for all the rest. Lastly, the long usage so much insisted upon, must be taken with all the circumstances of the case: that the lords of the manor of Ford were also the patrons of the living; that the rectors were in a dependent situation from the time of Rotherham (1616), and under general bonds of resignation, particularly Marsh and Wirkman, who signed the terriers of 1792 and 1806. The studied care with which the receipts from the rectors were prepared, sometimes signed by three or four witnesses, sometimes in the shape of deeds, releases, &c., and stated to be given after "the most strict inquiry," all shew a design of manufacturing evidence, and will prove too much. Some of the receipts, as also some of the evidence, speak of the *modus* as paid for the *parish* of Ford, evidently pointing to the lease as the origin of the custom. The effect of the evidence is to shew, that everything in the ancient history of the parish is at variance with the prescription set up; and it is shewn that no prescription, for any definite sum, existed for three centuries from the time of legal memory. In Davidson's time, no such prescription prevailed, but the 40*l.* was forced upon him by a general bond of resignation. In *Davidson v. Blake* the defendant, by his answer, alleged that the bond was taken to enforce residence, and was only put in suit upon the plaintiff's accepting the living of Lewisham. But the conduct of Blake shewed, that that was not the case; for as soon as the question of tithe was settled, Davidson was allowed to hold both livings to the time of his death, as appears from the books of the First Fruits Office. Up to the time of Davidson there is no pretence for saying, that there was any regular sum paid to the rectors, as a *modus*, but quite the

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contrary; and he received the stipend in order that he might be enabled to hold the two livings; and it appears also, at the termination of that suit he gave a bond to Blake, in a penalty of 2,000*l.*, to observe certain articles of agreement, which cannot now be found. In *Jenkins v. Blake* the bill was dismissed, without costs, and probably on the ground of maintenance, for Davidson, in his answer, alleges that the lease was made to Jenkins during the pendency of the first suit, and that he had told Jenkins, at the time, that he, Jenkins, must struggle through it as he best could. The evidence for the defendant, in the first old suit, goes to the discharge of all the lands in the *parish* of Ford; in the second answer, it is of all the *demesne lands* of Ford; and in this case, it is for the *lordship* of Ford. It appears, also, from the documents brought to light by the bill of discovery, that there was to have been a friendly tithe suit instituted by Marsh the elder (who was at that time negotiating with the lord for his son's succession to the living). The bill was filed, and the answer was prepared by the same solicitor, but Marsh the elder died before the answer was sworn. On the induction of Marsh the son, a general bond of resignation is taken, and he is made to write a letter to the solicitor of the then lord, in these terms,—“Sir,—After having properly informed myself of the facts, with respect to the living of Ford, I do hereby declare, that after the most strict inquiry, I find that, by way of a *modus*, 40*l.* a year has been paid to the rector of Ford in lieu of tithes. My father never received a larger sum, nor indeed any other for thirty-eight years, and I have seen Dr. Chalmers's receipts for the same sum, as a *modus*.” Under these circumstances, the acquiescence of the rectors is worth nothing. That the sum paid was not always the same, is evident also from the will of Edminstone, where he mentions his stipend as 30*l.* a year, and bequeaths the arrears to his niece; and the evidence of Alexander Davidson, the father of the rector, that there was no certain *modus*, but that the lord oftentimes constrained the rector to take what stipend he pleased. But when the pressure of the lord is taken off the rector, what is the

state of things? In the time of the Commonwealth, Pringle receives 60*l.* Scott, his successor, being under no bond of resignation, brings his action for tithes against the owners of Ford and Etal, and receives 500*l.* as the arrears of his tithes, and releases the lords and the tenants. Again, Catfordlaw, on its separation (the tithe payer being no longer the patron), immediately pays tithes in kind, though it has been said to have been sold with the tithes. The deeds, so much relied upon as dealing with the tithes, are mostly family deeds. In 1768, Askew was to have purchased the tithes of Mardon, as well as the tithes of Pallingsburn, but he refuses them himself, doubting whether the lord could make a good title to them. As to the fines, the 32 Hen. 8. relates only to tithes, which belonged to the suppressed monasteries, that is, tithes which were made lay fees by the statute of the preceding year; for it is expressly said, that all others should take their remedy in the spiritual court. As there is no contradiction in the parol evidence, and the cause depends mainly upon the interpretation of old documents and suits in Chancery, the Court will not judge this a fit case to go before a jury.

The Solicitor General, in reply.—The prescription, as laid in this case, consists of two parts: first, a discharge from tithes, as against the church; and secondly, a right in the lord, in regard of the compensation paid to the rector to take the tithes from the tenants of the manor. The *modus* is good against the church, because a proper compensation is paid to the rector, and the payment of the *modus*, and the perception of the tithes, are averred to be from time immemorial; but this first branch of the prescription is quite independent of the other. Now, the cases recognize claims precisely similar to the present, as well alleged as the holding of tithes in gross. Before the time of legal memory, and before the disabling statutes, the claim of the lord might have been acquired either by agreement upon good consideration or by alienation with the concurrence of the proper parties. That is laid down in *Pigot v. Heron*, and is clear from the argument of Moore in that case. Speaking of the first prescription, he says it is reasonable, “for it may be intended, that when this

manner of tithing began, all the lands of the manor were in the hands of the lord in demesne, before the grant of any freeholds or copyholds," &c. So in this case, in the time of Robert de Muschamp, owner of the manor of Ford and of the lands, such arrangement may well have been made, and indeed, from the locality, probably was made. Now, in the same case, it is said, that the second prescription is not material—that is, to the plaintiff; but when it is said, in that case, that a layman cannot prescribe for tithes, it is meant that he must shew special matter, that is, how he became connected with them, and that the church has received valuable consideration. In *Pigot v. Simpson*, the same objection was taken, but the Court said, it was a reasonable prescription, for when the lord had all the lands in his hands, he had the tithes by retainer, and when he gave the tenancy, he had them by pernaney. It is not, then, till the lord grants out the lands that he acquires a right to the tenths; and in case of such a grant, the reservation will operate rather as a new grant, by reason of the tithes not having had strictly a separate existence before. From these two cases it is clear, that the two prescriptions are separate, and that the tithes, under the word "tenths," pass under the word "hereditaments;" and that the latter prescription does not at all affect the validity of the former. This doctrine is confirmed by *Dykes v. Thompson*, *Wright v. Wright*, *Phillips v. Prytherick*. But the fine is a good bar to the plaintiff personally; and it is no answer to say, that the plaintiff did not know his rights. The defendant received the tithes under a title adverse to the parson. Therefore the fine is a good bar, if tithes are the subject of a fine. The object of a fine is to quiet doubtful titles. But it is said, that a fine could not be levied of tithes. Before the 18 Edw. 3, a layman could sue for tithes in the temporal courts. That power was restored by the 32 Hen. 8, *Selden*, c. 14. s. 5; and the operation of the last statute is not confined to the tithes of the suppressed monasteries, but its effect is to revive the old common law. In *Pigot v. Simpson*, it was held, that the plaintiff could sue either in the temporal or spiritual court, and yet the tithes claimed were not derived from a

suppressed monastery. But the doctrine is expressly laid down in *Ridley v. Storey* (12). The reason of the passing of the 32 Hen. 8, might have been as stated by the other side; but that at most is no argument that its operation is limited to the tithes of the suppressed monasteries. If then the common law remedy was revived, the effect of a fine and non-claim against a rector will be, that where adverse possession is submitted to for five years, ecclesiastical persons are as much bound in regard to their ecclesiastical right as any layman—*Shep. Touch.* p. 22, 1 *Pres. Conv.* p. 235, where the authorities are collected and commented upon. The instant the plaintiff received the 40*l.* in lieu of tithes, the operation of the fine began as against him. But, if the fine should not be conclusive, still there is no evidence of the parson having received tithes for 300 years; and there is evidence of the lord's right and enjoyment, evidence of reputation, and that carried back to the middle of the 16th century. This, coupled with the deeds, and especially the earliest mortgage produced (1624), makes a strong case in the defendant's favour. For the mortgagee at that time must have required good proof of the lord's title, before he would lend his money on the security of the tithes alone. But in 1663, Scott brings his action for tithes, and recovers a verdict. One might naturally have expected, from the publicity of the proceedings, to have heard nothing more of the *modus* from that time; yet, after an interval of a few years, the 40*l.* is again paid, and the tithe taken by the lord. The release, in consideration of 500*l.*, will make nothing for the plaintiff, for fifteen years of the stipend were due, and the sum will not cover that: besides that, there is no proof that the release related at all to the tithes of Ford. The suit, *Davidson v. Blake*, appears to have been compromised, but not for the reason presumed by the other side; else, how should Davidson afterwards grant a lease of his tithes to Jenkins? Certainly not out of any favour to the lord. The suit of *Jenkins v. Blake* was certainly not compromised; the violence of the proceedings gives sufficient indication of that. Neither

is there any ground to suppose that it was dismissed for maintenance; but the fair presumption is, that the modus was thereby established, as the lord continued from that time without interruption to enjoy the tithes. The transactions of Scott and Davidson are the only instances of interruptions of the prescription, and they are circumstances of such an equivocal character, as that the Court will not deem them sufficient to cut down a title, evidenced by such long usage. Nothing material can turn upon the resignation bonds, for before the decision in *The Bishop of London v. Fytche*, it was anything but unusual for patrons of livings to require them. As to the ancient documents that have been put in, as to the value of the living, Pope Nicholas' Taxation is in favour of the defendant. The return to 1380, is too vague to be evidence. There is indeed a great variance between the ecclesiastical survey and the parliamentary survey, but there is nothing in either to affect the defendant. Besides, these documents are very far from unexceptionable as evidence, and their reception has been permitted rather from custom, than in accordance with the strict rules of evidence. Their authority has been questioned in several cases.

Tamberlain v. Humphreys, 3 Eag. & You. 1367.

Drake v. Smith, Ibid. 1012.

Robinson v. Williamson, Ibid. 1038.

Short v. Lee, 2 Jac. & Walk. 464.

Jee v. Hockley, 4 Price, 87.

Atkins v. Drake, M'Cl. & You. 213.

1 Phill. Evid. 404.

As to Heatherslaw being a separate manor: The modus is pleaded for the manor of Ford, of which Heatherslaw is alleged to be a part. If it is proved not to be so, the modus is not therefore vitiated, but the defendant is entitled *pro tanto*—*Uthoff v. Lord Huntingfield* (13), and the cases collected in 2 Eag. on Tithes, p. 362. But there is no ground for presuming that Heatherslaw is not part of the manor of Ford. In the court rolls of 1658, it is treated by the lord and the tenants as part of the manor; and shortly before that time the castle had been sacked, and the

papers destroyed. Suppose Robert de Muschamp to have conveyed the manor of Ford (excepting Heatherslaw,) to Odinell de Ford the elder, and then to have conveyed Heatherslaw to the son; the books give many cases, in which, under such a state of things, both parcels have acquired the reputation of distinct manors, and have held distinct courts, and yet when reunited in one person, they would again become one entire manor.

Steel v. Prickett, 2 Stark. N.P.C. 471.

Com. Dig. 'Copyholder,' p. 21.

Scriven on Copyholds, p. 10, and the cases there collected.

But not a single court roll of the supposed manor of Heatherslaw has been produced. As to Catfordlaw paying tithes after the sale to the Carrs of Etal, that is an ambiguous fact, and not sufficient to outweigh the strong evidence adduced by the defendant. In order to a decree, there must be a clear legal right, otherwise the plaintiff is not entitled to that relief. There is nothing produced to counterpoise the ancient reputation, the long usage, the almost uninterrupted enjoyment by the lord, but ambiguous facts, conjecture, and surmise, and refined arguments founded on the most minute circumstances. It would be contrary to the common course of evidence, and destructive of the stability of property, to allow an old title to be overthrown on such grounds. In fine, the true principle on which such a case ought to be decided, will be found in the judgment of Little-dale, J. in *The Queen v. Archdall* (14).

Jan. 8, 1841. — ALDERSON, B.—This case was argued before me at the last Sittings in Serjeants' Inn Hall, at great length, and with distinguished ability and learning; and I have to express my thanks to the learned counsel, who appeared on that occasion, for the great assistance which they have rendered to the Court. The plaintiff, Mr. Knight, has filed his bill, claiming an account of tithes from the defendants. He is the rector of the parish of Ford. The defendants are occupiers of lands within the rectory; and they admit his title as rector, and their

(13) 1 Price, 237.

(14) 3 Nev. & Per. 696.

liability to the account, unless they are able to substantiate affirmatively in point of fact, and to support in point of law, the validity of the defence which they have put upon the record. That defence may be thus stated. They say, first, that the manor of Ford is, and from time immemorial hath always been, situate wholly within the parish of Ford. They then aver, that from time immemorial there has been payable by the owner of the manor of Ford for the time being, to the rector of Ford, the sum of 40*l.* annually, by two equal payments, at Lady-day and Michaelmas, in lieu of all tithes; and further, that from time immemorial, the owner for the time being of the manor of Ford, or his assigns, have been accustomed to have in respect of that sum of 40*l.*, so paid to the rector, the tenth of all titheable things arising within the manor. This prescription is the foundation of the defence, both of the Marquis of Waterford and his tenants, and of Mr. Askew and his tenants. The former set up the title to the tithes now claimed by the rector, as being in the Marquis, as owner of the manor of Ford; the latter, as to part of their lands, set up a title to the tithes in Mr. Askew, derived by express conveyance from Sir John Hussey Delaval, a former owner in fee simple of the manor, executed in the year 1768, to Mr. Askew's ancestor, and as to the residue, rely on the title of the Marquis of Waterford, with whom they say they have accounted for the tithes due. Both aver the immemorial and continuous payment of the 40*l.*, down to the period when the present plaintiff refused to receive it—namely, in 1822. The first point which was argued before me is, whether this prescription, as stated on the record, is valid in point of law. The authorities on this subject have all been brought before the Court. The prescription, indeed, is double; the first branch of it is, in fact, the assertion of an ordinary district *modus* in lieu of tithes; and if the evidence laid before the Court established that position, I apprehend that the addition of the other branch would not vitiate it. But the difficulty is, that all the facts of the case are inconsistent with this conclusion: a *modus* in lieu of tithes is inconsistent with the receipt of tithes in kind by any one. All the evidence

on the part of the defendant, however, shews, if it shews anything, that the lord of Ford immediately received the tithes, and the rector did not; that he has sold the tithes, and conveyed them as the ancestor of the Marquis of Waterford did to Mr. Askew, the ancestor of his co-defendants. This defence, therefore, fails in fact, and the question must arise and must be determined upon the compound prescription, including both branches, for the evidence certainly supports nothing else.

The first question then arises, as to the validity in point of law of such a defence; no case certainly has, as yet, gone to this extent. The cases of *Pigot v. Heron*, *Pigot v. Sympson*, and *Phillips v. Prytherick*, which were cited, establish this proposition, that a layman may prescribe in a *que estate* to have tithes as appurtenant to a manor or to lands; and this in the case of a manor is stated in the books to depend upon the supposition, that before time of memory, the lord, being seised of the manor, may have, with the assent of the patron and ordinary, lawfully entered into a bargain with the parson, to pay to him a certain pension, and in lieu thereof to have the tithes of the land within the manor, and that either by retainer he may himself enjoy, or by a prescriptive bargain with his tenants, he may take from them the tithes of their lands within the manor. The same supposition may be made in the case of the proprietor of land, and so tithes may be lawfully appurtenant to a manor or to land. But no authority has been cited which goes any farther, and which establishes that there has ever been allowed a prescription for the lord of the manor, or the proprietor of the land and his assigns, meaning the persons to whom he may assign the tithes, to take the tithes from the terre-tenants; for the effect of this would be, to make the right of taking the tithes assignable from one layman to another, and would make a layman capable of taking tithes in gross. I entertain, therefore, great doubts on this ground, as to the validity in point of law of this prescription. But, independently of this difficulty, which is a question of law, another point was made in the course of the argument, tending to the same result. It was suggested, that a very great inconvenience might fol-

low from such a prescription, if allowed; for the lord of the manor might alienate all the lay possessions of the manor, and then the parson, if the tithes also were assignable, might have nothing left out of which his pension could be secured; but inasmuch as the parson, patron, and ordinary, had the absolute power in ancient times of disposing of the tithes, they had the right to make, and may have in fact made this bargain, however improvident such an arrangement must have been for the church; and, therefore, I entertain some doubts whether, strictly speaking, that argument raises a difficulty in point of law. Thus, a *modus* is said to be invalid if it be rank; but I conceive that the rankness of a *modus* is not, strictly speaking, an objection in point of law to it. If there could be produced the original deeds containing the agreements, made at the proper period, and executed by the proper parties, such a *modus* would be valid. But the truth is, that the court of equity, judging both of the fact and of the law, determines from the gross absurdity of the bargain, that no such bargain was ever in fact made; and does not think it necessary to subject such question to further investigation; and so such questions, being habitually determined by the Court, have come to be considered questions of law and not of fact, to which latter class, however, they, more correctly speaking, belong. Here, therefore, if the prescription set up involves circumstances which induce this Court to come to the conclusion, that such bargain could ever have been made, this Court may act on these circumstances, using them as criteria for its decision in point of fact alone. And this it will be, perhaps, most judicious to do on the present occasion. I shall, therefore, not consider myself bound by this latter difficulty to hold, that this is an illegal prescription, but shall allow that objection to have its weight in the course of the examination which it will be my duty to make, as to the facts of the case. If the result of the whole should be, that the Court thinks the proper inference from all the facts is, that reasonable persons, acting on the one side and the other, have in fact made this arrangement before time of legal memory, then I propose to decree, that the bill should be dismissed,

with costs, subject only to the plaintiff's privilege of having an issue, in case he is advised to claim it. And on the other hand, if the inference be, that this is a mere usurpation, arising out of arrangements made at a comparatively modern period, the plaintiff will be entitled to an account, and to have the costs of this suit. The defendants' case, therefore, must first be stated, and it depends in the first place mainly on certain uniform payments to the parson, which are traced back by receipts, as far as the year 1690, the first receipt being of that date, and signed by George Chalmers, then rector of the parish, for half a year's payment, and stated to be for all manner of tithes. These receipts are produced in such numbers as to be, coupled with the evidence of payment from the steward's books, very fairly considered as proving a sum of 40*l.* continuously paid from 1690 to the year 1822, at the time when the present dispute arose. They vary, indeed, in some important particulars, both as to the nature of the payment, the periods of payment, and the description of the district for which the payment is made. The payment is called a *modus* or *saysen*; and in some cases a *rent*. The times of payment are certainly not uniform; and the district is sometimes described as the estate of the person paying in the *parish* of Ford, a description by no means unimportant when the other circumstances of the case are looked at. In other receipts, the district is called "the lordship of Ford," which accords better with the defendant's present pleadings. But no doubt much weight is due to this body of evidence; and I have on former occasions expressed, and still retain the opinion, that much of obscurity and somewhat of variation, may fairly be expected to be found in cases like the present, where the evidence extends over a long period of time, without greatly detracting from the importance of the proofs. In addition to this body of evidence, the defendant incidentally, by the depositions produced in the suits in equity, which have been laid before the Court, has shewn that a payment of 40*l.* per annum certainly existed at a period earlier than 1690. The other branch of the defendant's prescription depends mainly on the proofs of the lord of Ford having dealt with the

tithe—having sold them—having made them securities for money, and the like. These dealings, which are numerous, extend back to 1658, and are proved by the deeds coming from the custody of the defendants. Then come the suits in equity, which may be considered as applicable to the two branches of the prescription taken together. The earliest of these suits is that instituted by *Davidson v. Blake*, in 1676; and certainly no one in reading through that document alone would have supposed that a prescription, as now pleaded, was then in existence; for Davidson having in his bill claimed tithes in kind, as well as relief from the suit upon the resignation bond, Blake in his first answer claims merely a *modus decimandi* for his lands in the parish of Ford, of 40*l.*, which he explains in his further answer as being a modus for the demesne lands of the manor of Ford. The later suits, however, set up the present prescription in both its branches, and, indeed, in the same terms almost as it is now pleaded; but the evidence produced before the Court on those occasions, and the facts deposed to of very material variations in the amount paid, which are by no means satisfactorily explained, and the apparent collusion between the parties, do not, I think, entitle this part of the evidence to much, if to any, weight in favour of the defendants. On the contrary, it has appeared to me on examining it as carefully as I can, to throw considerable light on the plaintiff's case. The plaintiff makes several points in answer to the defendants' case: first, they say, that from a series of ancient documents, they can shew that this payment of 40*l.* could never have existed at so early a period as the reign of Richard I. It is very difficult to determine cases on conclusions drawn from such sources. These documents certainly shew, that the value of the living during the time of the wars of the border, was reduced to almost nothing; but some of them also shew, that at an earlier period it was much larger, sufficiently large, indeed, to have included this payment of 40*l.* as a portion of it; and all that we can, I think, fairly infer from the latter documents is, that it is somewhat more probable that the whole value was of a fluctuating

description, likely, therefore, entirely to be affected and wasted by the ravages of the border wars, rather than that it consisted of a fixed salary as to part, and a fluctuating profit as to the residue. On the other hand, if the fixed salary were payable by the lord, and his whole property as well as the residue of the tithes were wasted and destroyed by the same wars, it might, perhaps, be considered that the lord might be unable to pay, and that his inability to pay the fixed portion might fairly account for the description of the rector's whole income as destroyed and wasted by the hostile incursions; much weight, therefore, cannot be given to these documents.

The next point made is, that the manor of Ford did not originally include the manor of Heatherslaw; and to shew this, a variety of documents have been laid before the Court. It is not my intention to examine these in detail. I think the result of the whole is, that the manors were originally separate, and that they did not unite under the same lord till the 6 Hen. 6, a period long after legal memory. But this alone does not entitle the plaintiff to my judgment, except as to the lands of Heatherslaw. The prescription is for the manor of Ford; and though Heatherslaw is not a part of it, it may still be good for that which is included within Ford itself. But in one point of view, the separation of Heatherslaw from Ford is a circumstance of which the plaintiff is entitled to avail himself. Some of the receipts put in by the defendants, speak of the 40*l.* as paid for the estate of the person paying it in the parish of Ford; and the original answer of Blake, in the first suit, claims the modus for all his lands in the parish of Ford. Now, we find that Catfordlaw, which is in the lordship of Ford, has paid tithes, and this has been done, it may be fairly said, looking at some of the evidence in the suits in equity, ever since Catfordlaw ceased to be part of the estate of the ancestors of the Marquis of Waterford; and, again, it appears that Heatherslaw, which was not part of the lordship of Ford, and not originally in the possession of the owners of Ford lordship, did under the 40*l.* claim, and at some period after, when it was in their possession, obtain exemption

from tithes; and the same may also be said of other portions of land since included in the same estate. These facts, coupled with the wording of the receipts, and of the original answer, look as if the 40*l.* was paid as a compensation for the tithes of the estate of the person paying it, however circumstanced, if within the parish of Ford, and would seem to point to a lease from time to time granted, and continually renewed at the same rent, by the rectors to the owners of the tithe of their estates for the time being, as the origin of the whole. Certainly, the payment of tithes for Catfordlaw is a very strong fact for the plaintiff. It may be said, that the lord of Ford had no power over the proprietor of Catfordlaw, after he sold him the land and the tithes. It is not entirely clear to me, that he did sell to him the tithes; and if he did not, he had the right to take these tithes himself, supposing the prescription well founded. But supposing that he did, by the deeds he executed, pass the tithes from himself to the owner of Catfordlaw, it is a very strong fact against his having that right. That a person in 1658, well acquainted with all the facts as they really existed, to whom the tithes had been conveyed, should from that time have surrendered so valuable a right, and yielded these tithes to the usurping rector; and that the person who resisted was the patron holding the rector under the bond of resignation, a state of things uniformly kept up almost to the present time, I own the fact of the continued payment of tithes for Catfordlaw seems to me a very strong fact in favour of the plaintiff's right. We must add to this fact the variations in the amount of payment proved in the course of the suits, and which recurred almost at the same period of time when this separation took place. The clergyman appointed during the usurpation not being under the controul of the patron, received 60*l.*, and not 40*l.* Indeed, it seems as if the moment the power of the patron ceased to have weight, that the 40*l.* is either varied, or tithes in kind claimed and paid. There are also other objections to the defendants' claim: it includes all tithes, and, in truth, the defendants' documents speak of all tithes; yet it is clear, that the rector has

received some kind of tithes of small amount in the lordship of Ford, and even from that part of it which belongs to the defendants.

I shall make few observations on the documents disclosed by the bill of discovery. They shew an apprehension of the weakness of the defendants' title entertained at the time, and a great readiness on the part of the clergyman presented to give up the rights of the church without due inquiry—they exhibit the evils of lay patronage, especially where the proprietor of the lands subject to the tithes is the patron, and *pro tanto* diminish the value of the series of receipts signed by the clergymen so conducting themselves; but in general, I think, we are apt to place too great reliance on apparent manœuvring, and to consider that to be actually fraudulent, which, perhaps, may have been only an indirect proceeding of a weak person, in order to improve a case which he thought not sufficiently clear before. Upon the whole, however, considering all the facts of this case, and reverting to the observation before made, that the prescription itself set up is of a very improbable nature, and, therefore, requiring very clear proof, I have come to the conclusion, that the defendants have not made out satisfactorily, such a prescription in point of fact. If I saw that any further advantage could be obtained by the oral examination of witnesses, I would direct an issue to determine these points; but the question depends on documents almost entirely. There is, indeed, no disputed fact raised by the depositions of the witnesses; and it would, I think, be absurd to send to a Judge and jury at Nisi Prius to determine off-hand a mere question of fact, which depends on a careful investigation of documents, which I have myself reviewed, and which have required a long lapse of time for me to read over and carefully weigh. The defendants made, however, one other point, to which I shall shortly advert. They contended, that the plaintiff's right was barred by the fine which has been levied; but I think it was not. These tithes remain spiritual, according to the view I take of the facts of this case. They have always been received, under what must be considered, in the

opinion of the Court, to have really and legally been a composition of 40*l.* for them. If this view of the facts of the case be correct, the fine can have no operation; and if the opposite view be correct, it is not material to consider this question, for the foundation of the decree will fail.

Upon the whole, I have arrived at the conclusion, that I ought to decree for the plaintiff an account of the tithes due, and the costs of the suit.

ALDERSON, B. }
Feb. 23. } ADDISON v. WALKER.

Demurrer—Multifariousness—No Title in Plaintiff to sue.

*A, on the marriage of his daughter, covenanted with the trustees to pay 2,000*l.*, upon the trusts of the settlement. On the death of A, two of the trustees filed their bill for an account and payment against the executrix, and against B, the remaining trustee of the settlement, who claimed to have a mortgage over the whole estate of A, impeaching the mortgage, and praying an inquiry as to that, in case the executrix should deny assets. B. demurred, for that the bill was filed against him and the other defendant for distinct matters, in many of which he was in no manner interested; and, secondly, that the plaintiffs did not sustain a character entitling them to sue the defendant in manner in the bill set forth.*

Demurrer overruled, first, because B. was interested in all the matters of the bill; and, secondly, that the priority of the claim of B. as mortgagee, was a material circumstance, and necessarily connected with the account to be taken.

By indentures of settlement previous to the marriage of William Thomas Addison and Eliza Walker, Abraham Walker, the father, covenanted to pay to Edmund Walker, James Curtois, Richard Addison, and Ralph Addison, the trustees under the settlement, the sum of 2,000*l.*, and till payment of such sum to pay interest for the same, quarterly, at the rate of 5*l.* per cent. per annum; and the trustees were to stand possessed of the same, in trust to pay the interest and dividends of the 2,000*l.*, when paid, or the interest payable

by the father, in the meantime, to Eliza Walker for life, for her separate use, remainder to the husband for life, remainder to the children of the marriage. And it was therein declared that Abraham Walker should not, during his life, pay off the said principal sum of 2,000*l.*, without the consent of the husband and wife during their joint lives, or of the survivor, or of the trustees after the decease of the survivor. And the trustees were not to call in the said principal sum during the life of the father, except the interest should be in arrear. James Curtois was dead, leaving his three co-trustees surviving. The wife died in 1838, leaving five children, the issue of the marriage. Abraham Walker died in February 1838, having by his will appointed his widow, Almira C. Walker, Thomas Hodsoil and Edmund Walker, executors and executrix thereof. The widow alone proved the will. No part of the principal sum of 2,000*l.* had been paid off during the lifetime of the testator, but all interest thereon had been paid to the 1st of December 1839.

The bill stated, that the executrix had possessed herself of the personal estate and effects of the testator to a large amount, and more than sufficient to pay his just debts, &c., and that various applications had been made to her for the payment of the 2,000*l.*, with which she declined to comply, sometimes pretending that Edmund Walker claimed to be a mortgagee of all the property of which the testator died possessed, and also to be a judgment creditor of the testator, for a sum exceeding in amount the whole value of the testator's estate.

The bill then impeached the mortgage and judgment on various grounds, and charged, that the personal estate and effects of the testator were of a large amount in value; that he died possessed of leasehold and copyhold estates; and that Edmund Walker claimed to be a mortgagee of all the leasehold and copyhold premises; that the executrix, ever since the death of the testator, had carried on his business, and made large profits thereby, and had also, since his death, under the advice of Edmund Walker, paid the simple contract debts of the testator, and laid out considerable sums in improving the testator's property, of which Edmund Walker claimed

to be mortgagee; and that she had also in her hands a large sum of money, out of which the 2,000*l.* ought to be paid. And the plaintiffs submitted, that the sums so paid, under the advice of Edmund Walker, ought, as against the persons interested under the settlement, to be deemed and taken to have been paid to Edmund Walker, in part discharge of his mortgage security and judgment debt; and that the executrix ought to set forth the amount, &c. of the property of the testator possessed by her, and the profits made of the business since his death, and the particulars and amount of the simple contract debts, which she had paid under the advice of Edmund Walker, and what sum of money belonging to the testator's estate was now in her hands. It was also charged, that Edmund Walker some time since proceeded to revive his judgment debt against the testator's estate, and that the executrix confessed judgment therein, with a stay of execution till the fourth day of Hilary term, 1841, but that, under the circumstances, Edmund Walker ought to be restrained by injunction from suing out execution thereon till the respective rights of him and the *cestuis que trust* under the settlement were ascertained. That H. Hodson Walker claimed to be entitled under the will of the testator to the copyhold lands before mentioned. The bill prayed, that the executrix might be decreed to pay to W. T. Addison the interest due on the 2,000*l.*, and to pay to the trustees of the settlement the principal sum of 2,000*l.*, and in case of her not admitting assets, for an account, &c.; and that the leasehold, and, if necessary, the copyhold estates might be sold; and that the Master might inquire what simple contract debts had been paid by the executrix, and which, if any, were paid under the advice of Edmund Walker; and to inquire into the consideration of the mortgage and judgment, and what was now due thereon; and that Edmund Walker might be restrained from suing out execution upon the judgment. The plaintiffs were William Thomas Addison and the five children the issue of the marriage by W. T. Addison, their next friend, and Ralph Addison and Richard Addison, two of the trustees of the settlement; and the defendants were Almira C. Walker, the

executrix, Henry Hodson Walker and Edmund Walker, as one of the trustees, and as claiming as such mortgagee.

To this bill the defendant Edmund Walker demurred, on two grounds, first, that the same was exhibited against him and Almira Clementina Walker and Henry Hodson Walker, for several and distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in *any manner* interested or concerned; by reason of which distinct matters the bill is drawn out to a considerable length, &c. And secondly, that the said plaintiffs do not, nor doth either of them, on the face of their own bill, sustain a character entitling them to sue Edmund Walker, in manner in said bill set forth; for which reasons, and for divers other errors appearing in the said bill, defendant doth demur thereto, &c.

Mr. Simpkinson and *Mr. Wright*, for the demurrer.—This bill is clearly multifarious, for it embraces two distinct subject-matters. The plaintiffs are clearly entitled to an account of the personal estate of the testator, in which the Court will administer the assets in the regular way. But one creditor of the testator has no right to file his bill against another creditor merely for the purpose of impeaching his claim, much less to tack that question to a suit instituted for the administration of the estate of the original debtor. If he had a right to redeem, he has not offered to pay what is due. But he has no right to redeem, being neither the real nor personal representative of the testator, nor having any specific lien on the property, the subject of the mortgage—*Cooten on Mortgages*, 623, 625. If the Court were to decide in favour of the mortgagee's priority of claim, they could not decree payment upon this bill. There is no fraud or collusion charged between the mortgagee and executrix, so that they have no right to bring Edmund Walker here in that capacity. If fraud is charged, a creditor may file his bill for relief, but it must be by using the name of the executrix—*Elmsley v. Macaulay* (1), *Uttersen v. Mair* (2), *Alsager v. Romley* (3). The only exception is the case of the sur-

(1) 3 Bro. C.C. 624.

(2) 2 Ves. juv. 97.

(3) 6 Ves. 748.

living partner of the testator—*Bowsher v. Watkins* (4). In *Troughton v. Binkes* (5) it was held, that creditors under a trust deed could not have a decree for redemption against a mortgagee, except in case of collusion.

Mr. C. P. Cooper and Mr. Elderton, for the bill.—One ground of the demurrer, that for want of equity, must fail, for it is admitted, that the plaintiffs are entitled to some of the relief sought. As to the second ground, the object of the bill is mainly the administration of the testator's estate, and it is only in one alternative that any other relief is sought, namely, in the event of the executrix denying assets. Edmund Walker is a necessary party to the suit, which seeks to enforce the payment of the 2,000*l.* But if the executrix does not admit assets, then it is necessary to make those who have a charge on the real estate parties. The question of multifariousness is a question of convenience and of protection against unnecessary expense and delay, by reason of distinct matters being joined. The demurrer assumes, that the bill contains "several and distinct matters, in many of which this defendant is not in any manner interested or concerned." The defendant is interested in every matter, and no increased delay or expense will be incurred by him—*Campbell v. Mackay* (6).

ALDERSON, B.—This ought to have been a demurrer to part of the bill, instead of being general. There may be matters in which no relief can ultimately be given; but then the demurrer should have gone to that part, and not have been a general demurrer for want of equity. In every one of the matters the defendant is concerned. He is the trustee to whom the money is to be paid. Are these matters distinct from the account? Certainly not. Because if it is a proper matter for relief, the priority of this claim, on the part of Edmund Walker, is a material circumstance, and connected with the account. The second ground of demurrer altogether fails.
Demurrer overruled.

(4) 1 Russ. & Myl. 277.

(5) 6 Ves. 573.

(6) 1 Myl. & Cr. 603; s. c. 6 Law J. Rep. (N.S.) Chanc. 73.

C.B.
Jan. 13, 16, 22, 28; } MIDDLETON AND OTHERS
Feb. 23. } V. SHERBOURNE AND
OTHERS.

Jurisdiction—Validity of Will—Issue devisavit vel non—Receiver—Confessor—Superstitious Terrors—Undue Influence.

A, the heir-at-law, files his bill, impeaching the validity of a will of real estate, alleging outstanding terms in the way of trying the question at law, and praying that the will may be declared invalid, as obtained by undue influence, &c.; and if necessary, for an issue devisavit vel non, for a removal of the terms, and for a receiver.

On interlocutory motion for an issue and a receiver,—Held, that though a court of equity has no original jurisdiction to try the validity of a will of real or personal estate; yet when the bill alleges impediments to the trial at law, the Court has power to direct either an ejectment, or an issue "devisavit vel non," for the information of its own conscience; and that the issue is the most convenient course: and upon the issue being found against the will, the Court will proceed to decree a delivery up of the alleged will, or a perpetual injunction against the devisee; and also that such issue may be granted on motion before the hearing.

A receiver was refused under the circumstances.

Kerrick v. Bransby, 7 Bro. P.C. 437, and *Andrews v. Powys*, 2 Bro. P.C. 504, are no authorities for the proposition, that a court of equity has no jurisdiction to try the validity of a will of real or personal estate.

"Undue influence," to affect the validity of a will, must be domineering, viz. such as deprives the testator of being the proper master of his own faculties, the influence of strong fear, threats, or menace, partial insanity upon a particular subject, or arising from superstitious terrors; but it must be clearly established.

Where a person, standing in the relation of confessor to a testator, obtains thereby great controul over, and interferes in, the management of all his temporal affairs, advises him on the disposition of his property by will, and during the period of such relation takes large benefits by gifts inter vivos, and also by his will, these are circumstances affording a strong ground of inquiry as to undue influence.

The plaintiffs in this suit were Mrs. Middleton and Mrs. Eastwood, (with their respective husbands), claiming to be the nieces and co-heiresses of W. Heatley, deceased, whom the bill alleged to have died intestate; and the principal defendant was Thomas Sherbourne, a Roman Catholic priest, claiming to be devisee under the will and codicils of W. Heatley, of certain portions of his real estate, and also residuary devisee and legatee, and executor of the will. The object of the bill was twofold: first, to have an opportunity of trying the validity of the will as a legal instrument, on the ground of the incapacity of the testator, and of the undue influence exercised by Sherbourne over the mind of the testator, which was alleged to be naturally weak, in order to induce him to execute this instrument; and secondly, if that should not be established, that it might be declared, amongst other things, that the devises and bequests to Sherbourne were made by Heatley upon certain secret trusts for the Roman Catholic religion, which were illegal, and that consequently there was a resulting trust in favour of the two female plaintiffs. As to the first point, it was alleged, that there were outstanding terms affecting the estates devised, so that the plaintiffs were prevented from bringing an ejectment at law to try the question. The other defendants (except the plaintiffs' children) were Thomas Youens and R. Thompson, Roman Catholic priests, J. Briggs, vicar apostolic of the Yorkshire district, and J. Teebay, late steward of Heatley; and they were joined as defendants, with reference to certain conveyances and gifts made to them by Heatley in his lifetime, upon the same understanding with which the estates were alleged to have been devised by the pretended will.

The facts, as stated by the bill, were these:—The father of the female plaintiffs died in 1800, and their mother in 1802. Upon her death, they went to reside with their uncle, W. Heatley, where they continued till 1818, when the mother of the testator died; and at that time, Sherbourne, having obtained unlimited influence over the mind of Heatley, was the cause of their being expelled their uncle's house; and after their removal, Sherbourne began to act more openly: that the testator, at

that time, was possessed of considerable property, about 10,000*l.* a year: that he was induced, by Sherbourne and the other defendants, all of whom were Roman Catholic priests, to execute conveyances of certain parts of his property to some of them, without any valuable consideration: that he gave a sum of 10,000*l.* to Sherbourne, the greater part of which was afterwards laid out by Sherbourne in the purchase of an estate at Carlton, the contract being in Sherbourne's own name, and the conveyance to the other defendants in trust for him; and that he paid into the hands of some of the other defendants the sum of 12,562*l.*, which still remained there; and that he purchased canal shares in the names of other defendants: that immediately upon the death of Heatley, his butler, in the presence of Mr. Smith, a Roman Catholic priest, and in consequence, as he said, of directions received from the testator, on the very day of his death, burnt a variety of papers, without the knowledge of the next-of-kin: that Sherbourne then immediately came to Brindley Lodge, the residence of the testator, and found Mr. and Mrs. Eastwood there already: that he then desired to look for a will, and, when interrogated as to a will of Heatley, he first denied any knowledge of one, but afterwards stated that the will would be found in a particular part of the testator's bureau, where a will and two codicils, dated respectively the 16th of February 1829, 12th August 1835, and the 3rd of June 1836, were actually found: that the will and codicils were propounded by Sherbourne for probate, and opposed by the two nieces and their husbands: that a litigation was then going on in the Spiritual Court: that probate was not granted, and no person was authorized to collect the outstanding personal estate: that Teebay, the steward, in collusion with Sherbourne, had obtained from Heatley in his lifetime 3,500*l.*, for which he had given his bond to Sherbourne as obligee. The affidavit of Mr. and Mrs. Middleton, and Mr. and Mrs. Eastwood, in support of the motion, stated, that W. Heatley was entitled to various estates; that he died a bachelor, being seventy-seven years old at the time of his death; that he derived all his estates from his father and mother, and was of no

profession, except that he had served as a volunteer in the local militia; that all the branches of the family were Roman Catholics; that the nieces were treated by Heatley as his adopted children; that Heatley was a man of weak intellect, and his faculties gradually decayed; that twenty years before his death he withdrew himself from all society, and gave himself up to rigid observances, and acted under the belief that the future salvation of his soul depended upon the disposition of his property; that this belief amounted to an insane delusion; that he had a blind devotion to secular priests, and took no step in the controul of his worldly affairs; and that in particular, many years before his death, Sherbourne had obtained a most absolute controul over him, and also that he acted as his confessor. That Sherbourne was educated in Spain, and returned to this country in 1806; that he left this country for Spain in 1822, and returned again in 1825; that in 1818 the nieces had resided with their uncle for sixteen years, being respectively of the ages of twenty-one and twenty-three years; that they had no communication personally with their uncle on the subject of their removal; that they were never afterwards permitted to reside with him, except for some few weeks, when they were again expelled by the influence of Sherbourne; that the residence of Sherbourne was fifteen miles from Brindley Lodge; that Heatley, in April 1827, went to reside at "the Willows" (Sherbourne's house), but being dissatisfied with his residence there, arranged a plan to remove, and returned home in August following; that Sherbourne then resumed his visits to Brindley Lodge about once a fortnight, and introduced to Heatley a cotton-factory girl, of the name of Ellen Hayes, to lecture on divinity, and that such lectures were openly discountenanced by Mr. Pope, the resident priest, and by others of the same persuasion; that the visits of all persons to Heatley were carefully excluded by Sherbourne; that Heatley's dinner parties consisted exclusively of priests, who were present on one occasion fifteen in number; that, by means of such influence, Heatley contributed large sums to every Roman Catholic charity, and permitted large sums

of money to be laid out in lands, in the names of Sherbourne and the other defendants, none of such deeds being enrolled in the Court of Chancery within six months; and deponents believe that they took such lands upon some secret trusts; and particularly that in 1832 the Carlton estate was purchased with the money of Heatley, though the contract was made with Sherbourne, and the conveyance was to Youens and Briggs, and 8,914*l.* was the purchase-money. That Sherbourne had received a half-year's dividend on 12,562*l.* which was the money of Heatley; that they believed that Heatley had for many years ceased to keep a banking account in his own name, though formerly accustomed so to do, but left the money among the books in his library, a fact which was well known to Sherbourne and the other defendants; that Heatley required them to apply the dividends on the 12,562*l.* in a particular manner, which they always did; that at the time of his death, Heatley's property was not worth more than 4,500*l.*; that in the deponents' belief, when the will of 1829 was made, the testator was not in a disposing state of mind; and that when one of the estates so conveyed was required by a railway company, they refused to accept the title from the defendants, and consequently the conveyance was made by Heatley, and the consideration money expressed to be paid to him. That in the deponents' belief, Sherbourne and the other defendants intended to apply the property obtained from Heatley in augmentation of a fund raised by the secular priests of the Lancashire district (of which association all the defendants were members), for their own support, and for the promotion of the interests of the Roman Catholic Church.

By the constitutions of this society, which were read, each priest was to impress on the minds of his flock the merit of contributing to the fund, and was to celebrate mass every month for the benefactors generally; and besides, they were to celebrate mass specially—once for him who should give 10*l.* to the stock, twice for him who should give 20*l.*, and so in proportion. There was other evidence of the influence which Sherbourne had acquired over the mind of the testator, given by the servants,

and particularly, as to the escape from "the Willows;" that testator ordered Sherbourne to be watched off the premises, and then had his clothes hastily put into a gig, and went home, unknown to Sherbourne; that when at the Willows, he was constantly in the chapel adjoining, with Sherbourne, who used frequently to call his attention to a tomb there, built for him (Heatley), as a matter for his continual reflection.

The will and codicils left by the testator were as follows:—First, a will of 1824, produced by Sherbourne after the filing of the bill, by which the testator gave to Sherbourne his whole property, real and personal, except two legacies of 6,000*l.* each, given to each of his nieces, the plaintiffs. This will, according to Sherbourne's statement, was delivered to him by the testator in 1825, on his second return from Spain, and was in his possession and custody till deposited by him, after Heatley's death, in the Ecclesiastical Court. Next, the will of the 16th of February 1829, by which he gave Brindley Lodge, the household furniture, garden, and premises, and farm-house and lands adjoining, to his two nieces for life, with remainder to their respective children; and he gave all his lands and houses in Preston, a public-house and his estate in Salmsbury, and all his messuages and lands, whatsoever and wheresoever, of which he was seised, and over which he had power or disposition, and all his ready money, debts, &c., to his good friend, Thomas Sherbourne, otherwise Irving, his heirs, executors, administrators, and assigns. And he appointed Sherbourne executor of his said will.

By the first codicil, dated the 12th of August 1835, in the handwriting of Sherbourne, and averred by him to have been written at the dictation of Heatley, the testator appointed that his nieces should inherit, after his death, four fields, and other small property in addition, in the same manner as directed by his will concerning Brindley Lodge, &c.

By a second codicil, dated the 3rd of June 1836, partly in Sherbourne's handwriting, the testator gave his nieces a farm and other property, to be enjoyed in like manner as expressed concerning the mansion, &c. in his will, and then concluded

with this clause:—"It is probable that my having given a considerable part of my property to my friend, the Rev. Thomas Sherbourne, may give dissatisfaction to my nieces and their husbands, who have expressed themselves to the effect that they have a moral right to the whole after my death; now, in order, as far as possible, to prevent any vexatious proceedings, and to the intent that my will and codicils may have full effect, according to my intention as expressed therein, I direct that my said nieces or their representatives do, within twelve calendar months after my death, confirm my said will, and execute to Sherbourne, or his heirs, a release and conveyance of all the estates devised to him, and all claim and interest which they may have in the same. And in default thereof, I revoke the devises of the estates made to my said nieces, and I give and devise all the said premises to the only use of the said Thomas Sherbourne; and I confirm my said will in all other respects."

On the envelope enclosing the second will and codicils, were these words, in the testator's handwriting:—"I wish the rents of my estate at Carlton, which I purchased, but which is conveyed to others, to be at the disposal of Dr. Youens, to be applied for as many masses as 100*l.* will give; not to go beyond the Lancashire district. The remainder of the rent to be at the disposal of Dr. Youens, to enable him to comply with the above-mentioned purposes expressed as to young persons."

It appeared from the evidence, that Sherbourne mostly wrote or corrected all the letters of Heatley, and that he had had various conversations and discussions with Heatley relative to a man's moral right to leave all his property away from his relations.

The affidavit of Sherbourne denied that Heatley was a person of weak intellect, stating that in 1812 he was offered the Lieutenant-Colonelcy of the regiment, which he declined, in consequence of the delicate state of his health; and he denied that he had interfered in the disposal of Heatley's property. He alleged, that Mrs. Eastwood had incurred the displeasure of Heatley, by marrying her present husband; and that Heatley, for that cause, had directed the deponent to compel the

nieces to quit the house: that as to his writing Heatley's letters, Heatley had a fancy for his style of composition, and employed him, when unwell or particularly engaged, to write his letters, which Heatley afterwards copied. He admitted that he agreed with Heatley that a man had a moral right to leave his property away from his relations, in all cases except where he had children. He admitted that he had procured Ellen Hayes, not to lecture on controversial points of religion, but to teach the children of the neighbourhood their catechism. He also admitted that he had been Heatley's confessor from 1826 to 1832. He alleged, that the tomb, &c. in the chapel adjoining "the Willows" had been built for himself and his family only; and that the occasion of these gifts and legacies was a "warm and lasting friendship" which he had contracted with the testator, and which continued to the time of his death.

The prayer of the bill was, that the estates purchased in the names of the said priests with the money of Heatley might be declared to be a resulting trust in favour of the plaintiffs; and that it might be declared that the several conveyances made to the defendants, and the said will and codicils, were fraudulent, and, if necessary, for an issue or issues to try the validity of the will, &c.; and that the defendants might be restrained from setting up outstanding terms, and for a receiver of the personal estate during the litigation in the ecclesiastical courts, and for a receiver of the rents and profits of the real estates.

A motion was now made for an injunction to restrain the defendant Sherbourne from receiving the rents, &c. of the real estates so alleged to be devised to him; and for a receiver of the real and personal property, with the usual directions.

Mr. Simpkison, Mr. Sutton Sharpe, and Mr. Rolt, for the motion.—Looking at the enormous amount of these gifts, at the fortune of Mr. Heatley, at the situation of the defendant Sherbourne, (who admits himself to have been the confessor of Heatley from 1826 to 1832, in which time the greater parts of these gifts were made,) how can they be reconciled with the known principles of a court of equity? In 1829

and 1830, estates at Salmesbury and Walton-le-Dale were purchased with Heatley's money, and conveyed to Sherbourne himself. In 1832, the Carlton estate is purchased with the testator's money, and conveyed in fee to three other priests, in trust for Sherbourne. The 10,000*l.* was no doubt paid by Heatley into the bankers' hands, into the name of Sherbourne, for the purpose of paying for it; and as it is admitted that no trust of it has been declared, it follows, that there is a resulting trust in favour of the plaintiffs. Besides that, the writing on the envelope of the last will shews clearly for what purposes it was bought. Then Teebay borrows 3,500*l.* of Heatley, and gives a bond for it to Sherbourne, as the obligee; and this money is still outstanding. And besides, Sherbourne had the title-deeds of all Heatley's estates in his possession. These are circumstances from which we may infer the degree of influence which Sherbourne exercised over the testator's mind as his sole confessor. We must also take into consideration the circumstances attending the finding of the will and codicils; the retention by Sherbourne of the will of 1824, which was not produced till after the filing of the bill; the draft of one of the codicils in the handwriting of Sherbourne; his interference in all the testator's secular matters; and the inditing of his letters of business—all this shews the great degree of influence he had gained. There is here every ingredient to warrant the interposition of the Court, as Heatley was a man under the influence of strong religious feelings, and was persuaded that the saying of masses and the giving of alms were most essential points of faith; and there is no other conclusion, but that, under this persuasion, he was induced to make these gifts, at the time that Sherbourne was his confessor. These gifts, therefore, cannot stand. But as by the will and codicils the testator has given all his undisposed of property, real and personal, to Sherbourne, it would be useless to contest the gifts *inter vivos*, before impeaching the validity of the will; and it is necessary, for the purposes of justice, that the Court should direct an issue *devisavit vel non*. Then, with reference to the situation in which the parties stood to each other:—The Court will not

allow, except under particular circumstances, any gift between guardian and ward, attorney and client, or in analogous situations, while the relation exists. Sherbourne admits that he had contracted a "warm friendship" with Heatley, which continued to the time of his death. Now, the gifts *inter vivos* were made while Sherbourne was avowedly his sole confessor; and, from the admission of Sherbourne, it may be presumed, that the same influence continued up to the making of the last codicil. There are cases that bear very closely upon the present. In *Norton v. Kelly* (1), *Huguenin v. Baseley* (2), the gifts were set aside, on the ground of undue influence exercised by means of spiritual ascendancy. In *Dent v. Bennett* (3), the same principle was extended to the case of a medical man and his patient. The application of the principle is more strongly required in such a case as this, than in the cases laid down in the books, because the influence is so much the stronger. Has the Court no jurisdiction to appoint a receiver in such a case? The language of the Court has always been, that it would require a strong case to be made, and that then it would interfere; and the point was actually so decided in *Podmore v. Gunning* (4). Here, is a person holding the situation of spiritual adviser and confessor, receiving numerous gifts of large amount, obtaining a will by which he gets the great bulk of the testator's property, consulted as to his opinion of the morality of a man leaving all his property away from his relations, employed to expel the nieces from the house, mixed up in all the secular affairs of the testator, writing his private letters, and with all the title-deeds in his hands, though not brought up as an attorney, and his education only qualified him as a spiritual adviser. What is to account for this intimacy? The parties are not in the same situation in life, not college acquaintances, or bound by early associations. Must it not be referred to the only cause of this intimacy that pre-

sents itself, namely, the relation of spiritual adviser in which he stood to the testator? And when such persons have got possession of large property by means of their spiritual office, it is impossible not to make remarks on their spiritual character. It is justifiable also to allude to their religious belief, because their acts and conduct are in accordance with the rules they have laid down in the constitutions, for their conduct toward the persons over whom they have spiritual guidance. They are there directed to procure as large benefactions as they can, to be given to them as a body, that is, to the very persons who are instrumental in procuring them. But it is said, there are no cases in the books of gifts made to confessors held void. Since the establishment of a court of equity in a regular form, the Roman Catholic religion has not been the religion of the country; and it is very creditable to the Church of England, that there is no case with reference to this point. But the Court would not shrink from establishing such a rule, if it could be done by following out the general principles of a court of equity, or from the analogy of the cases. But in foreign countries, where the Roman Catholic religion prevails, the situation of confessor is assimilated to other characters in fiduciary situations, as guardian and ward, &c.—*Pothier*, tom. 13, *Traité des donations testamentaires*, c. 3. art. 3; and there it is said, that not only could he not obtain a legacy to himself, but not even to the convent or body to which he belonged. And again in tit. 14, 'Administrateur'—*Merlin, Répertoire de Jurisprudence*, tit. 'Confesseur.' And this is quite agreeable to the language of Lord Northington in *Norton v. Kelly*, and of Sir S. Romilly in *Huguenin v. Baseley*. But how much stronger do those arguments apply, considering the great power possessed by a confessor over his penitent—the description of the intimacy—the nature of Heatley's mind—and the influence spiritual subjects had over him, and his habits of life directed towards them, with priests only for his companions? This is a mixed case of incapacity and undue influence.

[LORD ABINGER, C.B.—In the case of a will, it must be considered whether the situation of the parties is such as to pre-

(1) 2 Eden, 286.

(2) 14 Ves. 273.

(3) 7 Sim. 539; s.c. 5 Law J. Rep. (N.S.) Chanc. 58.

(4) 5 Sim. 485; s.c. 5 Law J. Rep. (N.S.) Chanc. 266.

sume that the influence is domineering. A case was tried, under the directions of a court of equity, in which I was counsel, where a gentleman had left his property to a favourite groom; and Mr. Justice Chambre, the best lawyer of his day, told the jury, that he could not well define what amounted to undue influence; and by his directions, a verdict was found for the will. In *Lord Trimlestown's case* (5), it was said, that a will made in favour of the wife had been obtained through her influence; the verdict was against the will, but was set aside on appeal to the House of Lords. There is no question that a confessor has an influence paramount to all others; whether it has been fraudulently used, is another thing.]

The influence obtained here resulted from the situation of the parties; and is aptly described by the words of Lord Hardwicke in *Hylton v. Hylton* (6), as "good usage, unfairly meant." All the evidence as to the influence must be presumptive; but if there is one occasion on which that influence is resisted (as in this case), it throws great light upon the whole transaction. In order to obtain a receiver, it is not necessary to shew danger to the property, but only a strong probability that the deed has been improperly obtained—*Huguenin v. Baseley*.

Mr. Bethell and *Mr. Walker*, contra.—All the cases cited by the other side were cases not of testamentary bounty, but of donations *inter vivos*, and the doctrine has never been carried further; and yet, if it had, according to the analogy of the cases, it is incumbent on the party to shew a fraudulent use made of the relation: but they are obliged to assume the gifts themselves to be evidence of the fraud. Now, the first charge against Sherbourne occurs in 1818—that he then caused the expulsion of the plaintiffs from their uncle's house. This is a bare allegation. The defendant, in his affidavit, states that Heatley disapproved of the connexion that Mrs. Eastwood was about to form; and he pledges his oath that he interceded with the testator to prevent it. It appears also, that both the ladies were amply provided for

out of their own fortunes. In 1824, Sherbourne is in Spain, removed from all possibility of personal influence over Heatley, and what occurs? Heatley makes a disposition of his property more favourable to Sherbourne than by the last will. How, then, can the second will be said to have an injurious origin? As to Heatley's residence at "the Willows," it was necessary that Brindley Lodge should be repaired, and for that purpose the removal was made. The evidence brought forward of his conduct there, is merely the evidence of a discarded servant of Sherbourne. The next ground taken is, that he gave large sums of money to Roman Catholic clergymen. This is the first time that a court of justice has been called upon to infer idiotcy from the fact that a man possessed of competent means devoted a large portion of those means to charitable and religious purposes. There is no evidence whatever of his being a person of weak mind, but the contrary. Notwithstanding the influence of Sherbourne, the intention of Heatley to benefit his nieces increases with each successive will, so that they took a much larger benefit than they would have done under the will of 1824; added to this, that Heatley early warned them that they were not to expect to inherit the bulk of his property. Then, as to the law of the case:—The Court is asked, on the application of an heir, to appoint a receiver of a devised estate, upon the ground that the testator had not the free use of his faculties when he made his will. From all the cases, it is clear that the Court has no jurisdiction. To pronounce what is, or what is not, the will of the testator, whether it was obtained by undue influence, or by any degree of fraud, does not belong to this Court, but is the province of a jury, and to be exercised at common law. The present is the first occasion on which the attempt has been made. The earliest case is *Kerrick v. Bransby* (7), where it is laid down, that to decide upon the *animus testandi* belongs to the courts of common law.

Andrews v. Powys, 2 Bro. P.C. 476.

Bennet v. Vade, 2 Atk. 324.

Bates v. Graves, 2 Ves. jun. 288.

A court of equity never appoints a re-

(5) 1 Bligh, N.S. 427.

(6) 2 Ves. sen. 549.

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(7) 7 Bro. P.C. 437.

ceiver, except it will grant relief at the hearing; for the appointment of a receiver is in the nature of an equitable execution:

Davis v. the Duke of Marlborough, 2 Swanst. 165.

Pemberton v. Pemberton, 13 Ves. 297; in which case it was doubted whether it was not the proper course to direct the heir to bring an ejectment. In *Jones v. Jones* (8), Sir W. Grant says, "It is impossible that, at this time of day, it can be made a serious question whether it be in this court that the validity of a will, either of real or personal estate, is to be determined. There is, however, an alternative prayer, that the Court will direct an issue to be tried; and then certain other directions are sought, as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition was made, yet it is apprehended that he cannot insist on any such direction. He may bring his ejectment, and, if there are impediments to the proper trial of the merits, he may come here to have them removed; but he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions, that are asked only on the supposition that an issue is to be granted?" Again—"There is no case in which the Court has interfered, at the suit of heir or devisee, to restrain waste," during the litigation of the parties. "If the Court will not interfere to stay waste, *à fortiori* it will refuse to appoint a receiver." *Jones v. Frost* (9), *Jones v. Frost* (10); and the demurrer to the bill was allowed and confirmed on appeal—*Smith v. Collyer* (11). In *Gingell v. Horne* (12), the same attempt was made, and the authority of *Podmore v. Gunning*, as establishing the doctrine, was repudiated. The decision in *Podmore v. Gunning* takes for granted that the will is a *good* will, but that there is something *dehors* the will, which raises a trust in the devisee for the benefit of a third person.

[LORD ABINGER, C.B.—I should have doubted the principle of that case. If a

man does not choose to express in his will what he means, can you supply it *dehors*? There is an old case, *à converso*, which determines, that a man doing the most important services to the testator, in consideration of a promised benefit under the will, can neither maintain a bill nor action at law, if left out of the will.]

If a receiver could be appointed, is there any apprehension of danger? The Court could not appoint a receiver, unless it were prepared to say, that at the hearing it would set aside the will. *Tatham v. Wright* (13) was a strong case for a receiver, yet no such application was ever made. The foreign law which has been cited goes only to persons standing in the relation of parent and child: here are nieces only, amply provided for, and who take a large benefit under the will. In the case of personal property, the jurisdiction to appoint a receiver is undoubted; but it is exercised, not on the ground of title, but of the estate being unrepresented. But then the relief must be sought in a suit properly constituted—*Jones v. Frost*. With respect to the citations from *Pothier* and *Merlin*, the cases there make a distinction between the regular and secular clergy. The rule, however, is merely positive; but there is nothing in the laws of this country which prevents a person giving his property to anybody he thinks proper. In *Doe d. Parr v. Hicks* (14), where an attorney had made himself residuary legatee, Mr. Justice Buller held the bequest bad, but that opinion was disapproved. In *Ingram v. Wyatt* (15), an attorney had made himself sole legatee, and the will was held good, and the decision confirmed on a commission of review.

Mr. Simpmkinson, in reply.—First, as to the law of the case. It is not disputed, that a court of equity will not set aside a will of real estate—that it will not even interfere, till the validity of the will has been established at law; the greater part of the authorities go that length: but in all the cases there were no impediments existing or suggested by the bill to a trial of the question at law. Here are obstacles: *quoad* part of the property it is admitted

(8) 3 Mer. 171; s. c. 7 Price, 665.

(9) 3 Mad. 1.

(10) Jac. 466.

(11) 8 Ves. 89.

(12) 9 Sim. 539.

(13) 2 Russ. & Myl. 1.

(14) Cited in 3 Esp. 284.

(15) 3 Hag. Ec. Rep. 466.

that there are outstanding terms; and as to the rest of the property, the defendants will not deny that there are outstanding terms; which was the case in *Clark v. Dew* (16). The plaintiff, therefore, has a *locus standi* as far as regards the will; and the Court could not do justice without directing an issue. *Kerrick v. Bransby* was a question of mere legal estate; *Andrews v. Powys* and *Bennet v. Vade* were the same. Lord Hardwicke said, in the last case, that he would not interfere without directing an issue *devisavit vel non*. A similar doctrine was held in *Bates v. Graves* and *Pemberton v. Pemberton*, in which last case Lord Eldon said, that after a legal determination the Court would act. So also in *Jones v. Frost* and *Jones v. Jones*, in which last case Sir W. Grant says, he does not see any good reason why the Court should not interpose to preserve real property, for the same reason that it interferes in the case of personal property.

[LORD ABINGER, C.B.—That is merely the expression of his opinion; he does not say the law is so.]

The demurrer was allowed principally because the bill stated no impediments. Would the Court, at the hearing, give relief by removing impediments, or directing an issue? If so, it has jurisdiction to appoint an *interim* receiver. There are no printed authorities upon that point, though there are many expressions of the Judges that the Court would appoint a receiver in a strong case—

Mordaunt v. Hooper, Ambler, Blount's edit. 311.

Knight v. Duplessis, 1 Ves. sen. 324; s. c. 2 ibid. 360.

Lloyd v. Passingham, 16 Ves. 69.

And the same principle is recognized in *Clark v. Dew*. There is, however, an unreported case expressly deciding the point, *Buckland v. Soulten*, in Chancery, December 1824 (17). The plaintiffs were the next-of-kin and co-heirs in gavelkind of W. Buckland, and one of the plaintiffs was his heir-at-law; and the bill, alleging that the legal estate was outstanding in certain premises mentioned, prayed an issue *devisavit vel non*, to try the validity of an alleged

will and codicil of real estate, set up by the defendant, as devisee and executor; and, in the event of the issue being found against the validity of the will, that the two paper writings might be delivered up to the plaintiff to be cancelled; and in the meantime, for a receiver of the rents, &c. of the whole of the deceased's real estate; for an account of the rents and profits of the real and personal estate received by the defendant in the lifetime and after the death of William Buckland: and the bill alleging that the plaintiff had instituted proceedings in the Spiritual Court to prevent probate, it prayed also, during the litigation, a receiver of the outstanding personal estate, and an injunction in the meantime. A motion was made before Lord Eldon, for a receiver of the real and personal estate, and an injunction against Soulten, to restrain him from collecting the personal estate, and the rents and profits of the real estate. Mr. Hart and Mr. Knight Bruce were for the motion, and Mr. Treslove, contra. It was ordered, that an injunction should issue in the terms of the motion; and a reference was directed to the Master to appoint a receiver of the rents and profits of the real estate, and to collect the outstanding personal estate. And it was further ordered, that the parties do proceed to a trial at law at the Sittings after Hilary term next, on the issue *devisavit vel non*, &c. And that the Court has power to direct such issue upon motion, is decided by a MS. case, furnished by the Vice Chancellor, *Goulden v. Lydiate* (18), before Lord Eldon. The plaintiff, an infant, filed his bill as the next-of-kin of J. G., intestate, against the administrator and R. G., who also claimed to be next-of-kin. The defendant R. G. insisted, that the plaintiff was illegitimate. In July 1809, upon a motion for a receiver, an issue was directed by Lord Eldon, to try whether the plaintiff was legitimate. The issue was tried, and a verdict found for the plaintiff. The same mode of proceeding was adopted in *Fullagar v. Clarke* (19). The same principle is also to be found in *Agar v. the Regent's Canal Company* (20). In this case, the Court ought to direct an issue

(16) 1 Russ. & Myl. 103.

(17) Reg. Lib. A, fol. 186.

(18) Mich. 1808.

(19) 18 Ves. 481.

(20) Si G. Coop. 77.

at once; because, by the conditions of the second codicil, the plaintiffs will forfeit all benefit under the will, unless they ratify the will within the year. Next, as to the merits:—It is said, these gifts are to be ascribed to the charity of Heatley; but, according to the defendants, that charity is shewn by making over his property to them for their own use. As to the will, it was evidently copied from a paper writing in the possession of Sherbourne; and the first codicil is in his handwriting. All the facts shew the extraordinary interference of Sherbourne in the affairs of Heatley. When Sherbourne is asked by Heatley for Teebay's bond, before giving it up, he writes on the back of it, "Pay the contents to the Rev. T. Youens—T. Sherbourne." When questioned first as to a will, he denied all "knowledge" of one; but in his affidavit, he says he did not deny the "existence" of a will. All the circumstances shew the influence of Sherbourne, and that obtained through the medium of his office of confessor; and Sherbourne is continually profiting by his warm friendship, even to the exhausting of almost the whole of Heatley's property.

Mr. Bethell.—*Mordaunt v. Hooper* had nothing to do with a will, but was a case referable to another branch of the jurisdiction. Even there it was said, "a strong ground of title is necessary, and danger of the rents being lost." In *Knight v. Duplessis*, it is said, "there is no instance in which the Court has ordered a receiver for the benefit of the heir-at-law." *Lloyd v. Passingham* was not the case of a will: it was the fraud there that gave the Court jurisdiction.

[LORD ABINGER, C.B.—Suppose there are outstanding terms, the heir-at-law would have no remedy, except the Court had jurisdiction to direct an issue.]

The relief is confined to the removal of the impediments. In *Tatham v. Wright*, the issue was not opposed. In *Pemberton v. Pemberton* it is said, the more convenient form is ejectment.

[LORD ABINGER, C.B.—Fam of a different opinion.]

If the Court directs an issue, it then indirectly assumes to itself the power of trying the validity of a will. An issue is granted to a devisee, because he comes to establish

the will. In *Clark v. Dew*, the marginal note is at variance with the judgment; and the bill there was by the devisee. In *Buckland v. Soutten*, the order must have been made by arrangement, as an issue was ordered, though not asked by the notice of motion.

[LORD ABINGER, C.B.—It is probable that that addition to the order was by consent.]

The case furnished by the Vice Chancellor is entirely beside the question. Throughout the whole of the cases, this issue *devisavit vel non* is always the subject of decree, and never of interlocutory order; as also the removal of outstanding terms—*Northey v. Pearce* (21).

February 23.—LORD ABINGER, C.B. — This was a motion to appoint a receiver; for which purpose, some parts of the defendant's answer were read, and the affidavits filed on both sides. The object of the bill is, to investigate and to procure a decision upon certain proceedings which have taken place between the defendant and a gentleman of the name of Heatley, in Lancashire, who has made a will, and who has likewise disposed of his property by several intermediate transactions whilst he was alive, which are sought to be set aside by this bill. The motion was discussed at very great length, and a great variety of learning produced upon it; after which, it would not very well become me to pay so ill a compliment to the bar, as not to go somewhat over the grounds which have been taken both for and against the motion; although I might, perhaps, but for that circumstance, have arrived at the conclusion which I have come to by a much shorter process than that which, under the circumstances, I have thought it right to adopt. It was contended, in opposition to this motion, that one of the principal objects of the bill was to set aside a will; but that, as a court of equity had no jurisdiction to do this, it followed, as a consequence, that it could neither appoint a receiver nor grant an injunction; or, in other words, because the principal object of the bill could not be entertained by a

(21) 1 Sim. & Stu. 420.; s. c. 1 Law J. Rep. Chanc. 226.

court of equity, therefore the collateral consequences, which were incidental only to the original jurisdiction, could not be entertained by the Court. That, I conceive, was the general outline of Mr. Bethell's argument: and his first position was, that courts of equity had no jurisdiction whatever in trying the validity of a will—no jurisdiction as to a will of personality, because that belongs to the Ecclesiastical Court; and none as to a will of real estate, because that was a question of law, to be decided by a jury.

Now, before I enter into the proposition to the extent to which it was carried, I will refer to the authorities which were cited in support of it; and the first was the case of *Kerrick v. Bransby*. Upon looking at that case, there is not the least doubt that the abridgment of it, as given by the reporter at the top of it, corresponds with Mr. Bethell's quotation, because it is this—"A will cannot be set aside in equity for fraud or imposition; because if it is of personal estate, it may be set aside in the Ecclesiastical Court; and if of real estate, it may be set aside at law, on the issue *devisavit vel non*." That is a very imperfect statement; because an issue *devisavit vel non* is an issue, in truth, determined in a court of equity. After it is tried, a court of law can do nothing—it is still before a court of equity. However, when you come to look at the case of *Kerrick v. Bransby*, it will be found to furnish anything but an authority for that digest of it. It was the case of a bill filed for the purpose undoubtedly of setting aside a will, and for other proceedings incidental to a court of equity; and to that bill an answer was put in. The imposition and fraud were denied by the answer, and the cause went to a hearing upon the evidence; and upon the evidence it was clearly established, that there was neither fraud nor imposition in making the will. The only evidence of fraud was the declaration of a witness, who stated that the testator was incompetent, and did not know what he was about. It was proved, on the other side, that he was present when the will was given to her by the devisee to keep, and that she did keep it; and that then she urged no objection, and made no remark upon it. Three witnesses were exa-

mined, and the person who prepared the will; and there never was a clearer or more distinct case in support of a will, notwithstanding Lord Macclesfield, from circumstances which he laid hold of, thought fit to make a decree to set the will aside. A very short and imperfect note of that case will be found in 8 *Vin. Abr.* 167. It is evidently the same case, for there is Lord Macclesfield's very reasoning; and the reasons he states, as far you can rely upon that report, are very imperfect to support his judgment. That decision was appealed from to the House of Lords; and upon appeal the House of Lords reversed the judgment, and dismissed the bill. Upon what ground? Everybody knows that *Brown's Reports* contain the cases on both sides, and the substance of the decisions. When you look at the case in *Brown*, it is quite manifest that the whole cause was heard on the merits. On the merits, therefore, the bill was dismissed, because the will was, by the evidence, clearly established; and no person who exercised a competent judgment could doubt the propriety of establishing it. The decision, therefore, does not at all involve the question, whether or not a court of equity will entertain jurisdiction upon such a subject. In short, that case proves anything but the digest of it given by the reporter. I mention that case, because it was much relied on—probably, from the learned person who cited it not having gone through it thoroughly, but relying more upon the digest. And I am not surprised at his doing so, because I find, that in a great many subsequent allusions to it the digest is adopted, without reference to the body of the report itself.

The next case cited by Mr. Bethell was that of *Andrews v. Powys* (2 *Bro. P.C.* 476). That is a miscitation, at which I am also not surprised, because, in tracing a variety of cases from that period downwards, I find this has always been referred to in that page of the second volume, though in fact it is in page 504. Now, the case of *Andrews v. Powys* proves anything but the proposition for which it was cited; and yet it has often been cited for the same proposition: and I think I can shew the origin of the mistake. It was a very remarkable case of a testator

who had made two wills; one of which was made in favour of the plaintiff below, and the other, some time afterwards, in favour of the defendant. The defendant below was Andrews. He had procured the will to be made in his favour, and he had obtained the probate of it. The plaintiff Powys filed a bill, having discovered that; and, being in possession of the will which was made in his favour, he took proceedings in the Ecclesiastical Court, and obtained a certain monition to be issued, for the purpose of revoking the probate, and the case was depending in the Ecclesiastical Court; and that Court had made an order upon the executor, to whom the probate had been granted, to bring the money into that court. From that order, an appeal was made to the delegates, and the order was discharged, because the Court had no jurisdiction to direct money to be brought into court. After which, the plaintiff filed his bill, stating all the circumstances. To that bill there was a demurrer; and the demurrer was argued, on the ground that the court of equity had no jurisdiction in the case, but that it belonged exclusively to the Ecclesiastical Court; and moreover, that the plaintiff had no *locus standi in curia*, for that the defendant was the executor, and had the probate; and that the plaintiff had no interest whatever, but that he only pretended to have an interest under a will which was not proved. The objection was very plausible. The Lord Chancellor, Lord Macclesfield, overruled the demurrer, and afterwards made an order on the defendant, the probate executor, to bring in the money, and enjoined him from receiving any more money. Upon that, there was an appeal to the House of Lords; and the House of Lords, so far from dismissing the bill, confirmed the Lord Chancellor's decree. The appeal was dismissed, and the orders were all affirmed.

Now, this case is usually cited to shew that a court of equity will hold no jurisdiction to set aside a will of personalty; yet it may be cited to shew the very reverse. Now, that case, therefore, really proves no more than this, that, pending the litigation in the Ecclesiastical Court, as to who shall be executor, the Court of Chancery will grant an injunction, and

appoint a receiver, if necessary, and order money to be brought into court, if necessary, even by a person who has had probate granted to him, till that is decided. But that case does not establish the proposition, one way or the other, whether this Court has or has not original jurisdiction to set aside or to inquire into the particulars of a will. Now, it is very remarkable, that the first time I find that case referred to afterwards, is in one of the cases cited by Mr. Bethell, and of which he made considerable use in his argument at the bar—*Bennet v. Wade*. Now, I would just wish the bar to observe, how easy it is for one error, which creeps into a report, to be propagated by those who follow, not investigating the fountain, but following the stream. This case of *Bennet v. Wade* was in the year 1742, before Lord Hardwicke. There is no occasion to state what the circumstances were—they were not reported; it was cited for the authority of Lord Hardwicke. He says—"I am of opinion that the plaintiff in the original bill ought to be relieved. The principal question must arise upon the original bill. So far as the bill seeks to set aside the will, it is improper; for this Court cannot make a decree of this kind, but only direct an issue *devisavit vel non*." He is quite right there; "for it is settled, ever since the case of *Andrews v. Powys*, upon an appeal from Lord Macclesfield's decree, February 6, 1723, to the House of Lords, that a will cannot be set aside for fraud and imposition here, because a will of personal estate may be set aside in the Ecclesiastical Court for fraud, and of real estate, at law." Therefore he cites, what appears to be an abridgment of the case, in *Brown's Parliamentary Reports*; but he cites for it the case of *Andrews v. Powys*, which I have just shewn has no bearing on the subject. Now, I was led to this inquiry, by looking at the cases which were referred to by Mr. Bethell; and I found an old note of my own in a volume of *Atkyns*, in the margin, where the case of *Andrews v. Powys* was referred to—"He must mean *Kerrick v. Bransby*, which proves no such thing." *Kerrick v. Bransby* was the case he probably referred to, which had been cited in one or two cases as proving that, and as the case containing the marginal

digest which was said to prove that; but that, as I have just now stated, proves no such thing. But it is very remarkable, that the reporter *Atkins*, in reporting the case of *Andrews v. Powys*, in referring to the case at the bottom, gives the very page, 476, that was cited by Mr. Bethell, whereas it is 504. And this has also happened in other cases.

Now, look at what Lord Hardwicke says, in another page in the same volume, *Webb v. Claverden*, p. 424, "This Court will not determine there is fraud in procuring a will without a trial at law." There is the true qualification. I take it that this Court does not hold original jurisdiction, and certainly it never can, to set aside a will, either of real estate or of personal estate, or to establish a will; but this Court will, when it becomes necessary that its jurisdiction should be exercised, from the circumstances of the case, proceed to investigate whether the will was properly made or not, though it will not decree against it, generally speaking, without an issue *devisavit vel non*; and when that issue has been determined, what is the Court to do? If the Court has no jurisdiction upon the case, after an issue found against the will, what is the Court to do? Is it to do nothing? It must proceed to do something. The Court will either make an order for the delivery up of the will to be cancelled, or it will grant a perpetual injunction against the party claiming under it, or *vice versâ*. Then the principle really comes to this, that in cases where there is no occasion to resort to a court of equity—and there are one or two cases of that sort in the books—where there is a simple statement that the will was made by fraud and imposition, or that the testator was incompetent, and that there is no impediment in the way of a trial at law, the bill may be demurred to, because it contains no matter upon which the party is entitled to relief in equity; the heir-at-law may bring an ejectment, and he does not need the assistance of a court of equity. But in cases where he cannot try his ejectment without removing obstacles which are in his way, he may properly apply to a court of equity to remove those obstacles. But there is another class of cases where the whole property in question that is litigated

is real estate only, and with which a court of equity alone can deal. In such a case, I take it that it is perfectly competent to a court of equity, supposing the case of an equity of redemption,—a case where the parties who are seeking the assistance of the Court, seek only to obtain a declaration of trust in their favour—a court of equity is the proper jurisdiction to apply to; and when, in order to exercise that jurisdiction, the Court is obliged to make a preliminary inquiry, it may do so either by an issue *devisavit vel non*, or by directing an action of ejectment to be brought. But in many cases, the best and the proper remedy is an issue, because when an action of ejectment is brought and a recovery takes place at law, what is then to be done? An action of ejectment will try *toties quoties*; it is no bar at law; therefore a court of equity must do something. That very often is more conveniently done by directing an issue; for this reason, that in directing an issue, the Court has jurisdiction over the whole case, and it may grant a new trial or not at its pleasure; but in an ejectment, a new trial can be granted only by a court of law; therefore the Court to a certain extent parts with its power, and gives it to another tribunal; whereas equity may require that the whole matter should be reserved for its own consideration. For example, suppose the Lord Chancellor should be perfectly satisfied that the will was void, and ought to be set aside, but that he must direct an ejectment; the evidence might be still unsatisfactory to him, and the trial at law might be very unsatisfactory, but he cannot grant a new trial. It is, therefore, in many cases, more convenient that an issue should be directed; not that the Court has the original jurisdiction to interfere with the will, but it has an incidental jurisdiction where the party who is seeking to set aside the will has no other remedy but to apply to a court of equity; and in that case, a court of equity has power to direct an issue to be tried, for the information of its own conscience, before it makes a final decree; and that decree, if against the will, must either order the delivery up of the will to be cancelled, or grant a perpetual injunction against the devisee. I have stated this with a view to discuss the principle upon which a court

of equity in such a case acts, and with reference to the arguments which have been urged, very properly, at the bar, from which I inferred that the object of the counsel was to protest against the jurisdiction of the Court altogether, and to say that an issue could not be directed without consent, but that the party must proceed by action of ejectment, and that all the Court could do was to remove obstacles. I am of opinion, on these principles, that where a party can have no relief at law, and he must seek relief in a court of equity, that Court has a clear power, by way of informing its own conscience, before it administers relief finally, to direct an issue to be tried.

Now, having stated thus much, I will proceed to the particulars of this case. There are several very remarkable circumstances in this case, and which require (if they be true, as stated in the bill and affidavits) the interference of a court of equity; and relief can be had before no other tribunal. I will mention three instances:—one instance is, an estate in the township of Salmesbury, upon which it appears, that the estate was purchased by Mr. Heatley, the testator; that it was paid for out of his own money; that the conveyance, however, was made to Mr. Sherbourne, the defendant; that Mr. Heatley remained in possession of the rents and profits up to his death. Now, upon that naked mode of stating the case, the first question that presents itself is, is Mr. Sherbourne the equitable owner of that estate, or is he a trustee for the purchaser? It was purchased with the money of Mr. Heatley, who received the rents and profits during his lifetime. What is there to shew that Mr. Sherbourne has any interest in it, except the fact, that his name is in the conveyance? Such a case nakedly stated, is a case to call upon the Court, unless the name of Mr. Sherbourne is explained by some circumstance, to shew that he is the equitable as well as the legal owner, to interfere and declare him to be a trustee. It is well understood, that if a man purchase an estate with his own money, and have it conveyed to another by his own direction, that *prima facie* the person to whom it is so conveyed is his trustee until the contrary appear. Now, I cannot assume the con-

trary here, merely upon Mr. Sherbourne's own statement. The party who seeks to investigate that transaction, is not bound to take Mr. Sherbourne's statement, that it was the intention of the testator to give him the property, and that, therefore, he put his name in the conveyance. It depends on his statement alone, which would not be evidence at law, and ought not to be evidence here, unless confirmed by very satisfactory circumstances. Now, the same remark applies to another estate in Walton-le-Dale, and purchased, I believe, from Sir Harry Houghton and his trustees: that also appears to have been contracted for by Mr. Heatley, and to have been paid for with his own money; but the conveyance was made to Mr. Sherbourne in like manner. Mr. Heatley received the rents and profits during his life, a fact which is not consistent with the estate belonging to any one else,—and that case nakedly stated as the other, presents the same results;—and the question to be investigated is, whether Mr. Sherbourne is a trustee for Mr. Heatley, and, therefore, for his heir-at-law, or whether he is the owner of the estate. Well, then, there is a third question which is very considerable and very important. It appears on the answer and in the affidavits, that some time before Mr. Heatley's death—for how long does not appear, but for some years—an account was opened at Preston, in the name of Mr. Thompson (another priest,) and Mr. Sherbourne, and that Mr. Heatley paid monies from time to time, his own monies, to Mr. Thompson, and that Mr. Thompson carried those monies to the joint account of himself and Mr. Sherbourne, at his bankers, no direction having been given to Mr. Thompson to do so, but that he had done so. It then appears, that in the year 1839, the year before his death, by his order, (as Mr. Sherbourne states,) Mr. Thompson gave an order to the bank to transfer 12,562*l.*, being by conjecture I suppose, the aggregate of the sums that he had received, or at least a portion, to the account of a Mr. Youens and Mr. Pratt. Mr. Pratt is since dead, and it stands now in the bank in the name of Mr. Youens, without any directions or order whatever. Now, that fact, as it is stated nakedly in the answer itself, surely implies that the

money was Mr. Heatley's. It was his money originally; no consideration is given for anything that is done with it; and it does not appear that he had given it away to anybody; but the statement simply is, that the money was paid by his order to Thompson, and then he ceased to exercise any power over it; for it appears that he ordered Thompson afterwards to pay it to another account. That is not explained. Now, that is a transaction that requires explanation. Is it the property of Mr. Heatley, and does it go to his executors or not? Does it belong to his next-of-kin, if there be no will? or if there be a will, does it belong to his executors? Now, there is a fourth transaction, which is also a very singular one. It appears upon the answer, that a sum of 10,000*l.* was paid by Mr. Heatley to Mr. Sherbourne; that Mr. Sherbourne contracted to purchase an estate for 8,914*l.*; that the conveyance was made to Mr. Thompson, Mr. Youens, and a third person, by Mr. Sherbourne's desire. Mr. Sherbourne, as he states, made a contract with the vendor, and by his directions the estates were conveyed to these three persons. What became of the estate? Why he states that Mr. Heatley received the rents and profits during his life. But he states another fact, that the 10,000*l.* which he received he was to pay bank interest for, and that when the transaction was terminated in the purchase of the estate, he agreed with Mr. Heatley that he should receive the rents and profits, as far as they would go, for the 8,914*l.*, and bank interest for the remainder. That is the transaction stated. What is the meaning of it? Does the estate belong to Mr. Heatley or to Mr. Sherbourne? If the estate belongs to Mr. Sherbourne, is he not a debtor to Mr. Heatley for the 10,000*l.*? These are very considerable questions, which require investigation, and a court of equity is the proper place to investigate them, especially if there is a dispute about the ulterior title of persons under a deceased person. Now, having stated these transactions, I think everybody must see that there is enough stated upon the affidavits to call for investigation, without pronouncing any opinion upon what the result may be, of any investigation. But of what use would be

any investigation upon this subject? Of what use to the parties would be the expense of an inquiry into the subject, provided the will which Mr. Sherbourne sets up shall be established? because if that will is established in his favour, all these equities and all these legal rights will be put at rest by the will. If Mr. Heatley has an equitable estate in those three purchases which I have mentioned, or if he has a title to treat the 12,562*l.* as his own, and I may add also, the bond given by Teebay for money advanced by Mr. Heatley, (yet the bond is taken in the name of Mr. Sherbourne,) all these things would become very important, supposing Mr. Heatley had died intestate. It would then have been a very considerable question—at least it would have been a question which Mr. Sherbourne would have had a right, if he pleased, to investigate—whether or not these different transactions gave him the money or the land, or whether the heir-at-law or the next-of-kin would be entitled. But it is perfectly plain, that if there is a good will, it vests the whole in Mr. Sherbourne, and all inquiry becomes nugatory. It appears to me, therefore, that the preliminary question is, was there a will or not? I do not see how I can accede to this motion till the question is determined, whether the testator has really made a will in Mr. Sherbourne's favour or not. If he has, there is no occasion to put the parties to further expense, or to entertain jurisdiction over any one of these subjects; but if he has not, then it becomes a very serious question between Mr. Sherbourne and the representatives of the testator, both real and personal, how these transactions are to be considered, and in whom the equitable interest is now vested. It appears to me, therefore, that I cannot with propriety, (I have given the case much anxious consideration,) come to any conclusion on this subject upon this motion until I direct an issue to be tried, whether a will was made or not; therefore I am disposed to direct, that an issue shall be tried in order to investigate the validity of the will, and of the codicils that were last made. There is a remark to be made upon that: I wish to pronounce no opinion what the result of that investigation may be: I have formed none. It was very much

argued before me, that the relation in which the parties stood to each other, made it difficult even to sustain the will. Now upon that subject I am prepared to say, that I do not think mere influence is enough to set aside a will. All wills are made under some kind of influence—the influence of affection or attachment, which is perfectly legitimate. If a man makes a will under that influence, to exclude his own family, and gives his estate to a stranger, I do not apprehend that that will could be displaced at law or in equity: the question, therefore, comes to the degree of influence. It must be such a degree of influence, if you choose to call it by that name, as deprives the testator of being the proper master of his own faculties. A degree of influence arising from strong fear, and from threats or menace, would undoubtedly be sufficient, I think, to set aside the will and make it void at law. So would a degree of influence arising from partial insanity or delusion upon a particular subject. There was a celebrated case which I remember, though I do not think anybody whom I have now the honour to address, will remember it, (I am unluckily now the oldest in the profession,) there was a case of *Greenwood v. Greenwood* (22), where a gentleman, not only of considerable capacity, but of extraordinary talent, who had much distinguished himself at Cambridge, having taken a high degree and high honours there, and who also in general society was considered a man of considerable learning and acquirements, had taken a prejudice against his own brother. He thought his brother meant to poison him. There was no other subject in the world upon which he was under a delusion; but it was quite clearly established, that upon that subject he was so. It was thought that under that delusion he made his will. There were three or four trials about it, and upon one or two occasions, the will was set aside. I believe it was afterwards established, the jury not believing that he was under a delusion at the time he made his will; but still it was a case in which it was admitted, that if he had been under a delusion upon that subject, the will would have been bad. That

is an instance where a man makes his will under the influence of strong passion, which is altogether unfounded—jealousy, or fear of another individual—that is, of partial insanity, which, if it governs the man in the act he is doing, ought to make it void. So with respect to a delusion arising (which is suggested in the bill, though it is undoubtedly answered by the affidavits—it is a matter to be tried,) from superstitious terrors; I can easily conceive a case of a man of very strong mind being under the influence of such a superstitious terror or delusion, as that he might think it necessary to his salvation that he should give all his money to his priest or confessor. If that were clearly established, I am by no means prepared to say, that it would not be a very sufficient ground, and were I the Judge directing the jury upon the subject, I should say, that if they found it to be such a degree of delusion, as to deprive the man of the free exercise of his judgment in what he was doing, it would be sufficient to destroy the will. A case has been cited for the purpose of shewing that—*Huguenin v. Baseley*; I remember that case well; I was present when Lord Eldon decided it. I knew the defendant Baseley; he was a clergyman of the church of England, and a very respectable man. Mr. Sharpe has quoted very properly the argument of Sir S. Romilly, in that case, against the will, and he has taken up Sir S. Romilly's suggestion. He has shewn that by the French law, or the law existing over the greatest part of the continent where the Roman Catholic religion prevails, a gift made to a confessor would be void by reason of the relation of the parties. Now, you will observe, upon looking at that case, that Lord Eldon altogether evades that part of the subject, though he decreed the gifts made to Mr. Baseley to be set aside. That was during the lifetime of Mrs. Hill: she had married the plaintiff, and joined with him in filing the bill. The Lord Chancellor set them aside, but he put it on the ground, that Mr. Baseley had shewn by his own conduct that he had acquired the management of her affairs; that he stood in the relation of a confidential agent, having the direction and management of her affairs; and he founded his judgment on a letter which Mr. Baseley had caused

(22) See Swinburne on Wills, 7th ed., p. 124, n.

her to write to her solicitor, dismissing him. Her former solicitor, who had never misconducted himself, was dismissed by a letter which she wrote, copied by her from one which Baseley wrote for her, in which she stated, that Providence had presented her with a kind friend, a person who was competent to manage her affairs; that she should have no further occasion for her solicitor, and that she wanted to put the whole of her affairs into Mr. Baseley's hands. The Lord Chancellor considered that Baseley had caused her to write the letter, and that he had got possession of her affairs; and, therefore, he brought it within that class of cases which have determined, that a gift made under the influence of the confidential manager of a party, cannot be sustained, being without consideration.

Now, it is to be observed in the present case, that Sherbourne stood in the relation, during a period which embraced all the transactions that I have mentioned, and which also embraces the time of making the will—he stood in the relation of confessor to Heatley: but he was more than that; it is plain from the facts stated and obtained from the whole body of the evidence, such as it is, that he had—I was about to say unlimited—but that he had very great controul over all Heatley's affairs; and the very fact I have mentioned that the sum of 10,000*l.* was paid to him, and that he bought an estate with it—that the 12,000*l.* was paid to an account in which he had a joint interest, and transferred from that account afterwards; and his own admission that letters were written by him for the testator; that from the testator preferring his style to his own, he often got him to write letters which he copied—all these are strong facts to shew an interference in the management of his temporal affairs. Well, then, there is a very extraordinary fact, that one of the codicils contains the handwriting of Sherbourne, and that is a codicil which fastens a condition on the plaintiffs, that they shall give a release to Sherbourne within twelve months after his death, or the legacies shall go over. Now, that is a very strong fact; I do not pretend at all to draw any inference from it, but it is very fit that a jury should be allowed to draw their in-

ference from these facts. This gentleman stands in the most confidential relation which can subsist between a clergyman and a layman—viz. that of confessor to his friend, and unites with that character, I should say, the character of confidential manager of his friend's temporal affairs. These are circumstances which require some consideration. If they go to the extent of shewing, that the will or any of the codicils were improperly made, or that they were all made under that degree of delusion, or that degree of terror which, in the opinion of a jury, might constitute a want of real capacity to judge what he was about, then the will and codicils would be void: if they are established, then there is an end of all further inquiry.

It appears to me, therefore, that this is a fit case to be submitted to the consideration of a jury, and that that consideration must be preliminary to the interference of this Court; it being perfectly plain in one case, that all interference here would be vain and profitless, though in the other case, it might be essential. I, therefore, think, that an issue ought to be tried, and I am the more satisfied in coming to that conclusion, because I am sure Mr. Sherbourne, who is a man of education and knowledge, whatever his origin may be, (for that is no reflection upon him,) must be aware that it would be a very great advantage to him, as well as to the other parties, that this question, if possible, should be decided before the twelve months expire, which is the time limited in that conditional codicil, which is partly under his own hand. I, therefore, direct an issue in this case, to try the validity of the will of 1839, and the codicils; and for the purpose of preventing all delay, I direct, that the plaintiffs in equity shall be plaintiffs at law. I do this that the plaintiffs may have no delay, having the record in their own power.

His Lordship afterwards offered, on the consent of both parties, to direct an issue as to the will of 1824, as well as the will of 1839; but the issue was ultimately directed as to the last will and codicils only.

The issue came on for trial at the ensuing Liverpool Spring Assizes, but the matter was compromised by the parties.

C.B. } *Ex parte* SHAW *re* MANCHESTER
June 3. } AND SHEFFIELD RAILWAY
COMPANY.

Railway — Payment of Money out of Court.

A small sum of money paid into court by a railway company for farm buildings taken by them, was ordered to be paid out to a trustee, for the purpose of being expended in new buildings proposed to be erected.

The company had taken certain farm buildings and premises belonging to the petitioner, as trustee, for the purpose of their railway, and had paid the sum of 450*l.* into court. The Master had reported, that it was fit that this money should be laid out in erecting new buildings, &c., and an order was made, that the trustees should complete the buildings, and on the certificate of the Master of such completion, &c., the money should be paid out to him.

Mr. Mylne, on the part of the petitioner, and with the consent of all parties interested, now asked, that that order, which was not yet drawn up, might be varied, and that the money might be directed to be paid to the trustees *prospectively*, to lay out in new buildings. That the sum being small, the working of the order as it stood, would be attended with considerable inconvenience and expense.

LORD ABINGER, C.B.—Let the money be paid out to the trustees as now asked, and let the prayer of the petition be amended accordingly.

C.B. }
June 29. } POPE *v.* GARLAND.

Vendor and Purchaser — Specific Performance — Misrepresentation — Costs.

At a sale by auction, A. became the purchaser of an estate described in the particulars, as "Lot 3, being a certain freehold house, numbered," &c. With the particulars was folded up a plan, described as "the ground plan of the estate of the late W. L.," in which each lot was numbered to correspond with the particulars, and distinguished by lines and shadings, as containing so many

buildings and so much ground. The particulars did not refer to this plan. The title being settled, A. sent a surveyor over the property, and he then discovered that part of the land and buildings marked in the plan as belonging to Lot 3, had been conveyed to the purchaser of Lot 4, and that an upper room in an adjoining lot overhung and rested upon part of Lot 3. A. refused to complete his purchase. A motion was made that he should pay the purchase-money into court. A cross motion was made by A., to be released from his purchase, or to have compensation on the ground of misrepresentation. The auctioneer made an affidavit, that he gave out to the company that he was selling by the particulars only, and not by the plan, which was merely for the general guidance of the purchasers. The solicitor of A. deposed that he was present during the time of the sale, and never heard any such intimation:—Held, that A. was entitled to be relieved from his purchase, on the ground of misrepresentation; and that it was not competent to an auctioneer to say at the time of sale, that he is not bound by the description generally; though he might, perhaps, as to some specific point.

Semble—If the overhanging of the adjoining house was not visible to the eye, that would have been sufficient alone to have discharged the purchaser; secus, if visible.

At a sale by auction of part of the real estates of the testator in the cause, in March 1841, J. Nash became the purchaser of Lots 1, 2, and 3. The report of the purchase was confirmed, and the title accepted. The plaintiff now moved, that Nash should pay his purchase-money into court, with interest. There was a cross motion by the purchaser, that he might be discharged from his purchase, and reimbursed all his costs in respect of Lot 3, together with the costs of this application; or in the alternative, that he might be paid a compensation for so much of the said lot, specified in a certain plan annexed to the particulars of sale, as the vendors refused or were unable to convey.

In the particulars of sale, Lot 3 was described as a freehold public-house, &c., let at so much per annum, and standing upon a certain quantity of land; and there was doubled up with the particulars a

ground plan, with these words upon it, "the plan of a freehold estate, the property of the late W. Law, esq." In this plan, the different lots were numbered and distinguished by coloured lines, and the parts covered by buildings were distinguished, by being marked out and shaded. After the title was approved of, the purchaser sent a surveyor over the premises, when he discovered that part of the land and premises described in the said ground plan, as belonging to Lot 3, had been conveyed to the purchaser of Lot 4, and that part of a building belonging to Lot 4, overhung and rested upon an out-house belonging to Lot 3. Under these circumstances, Nash refused to complete his purchase.

Mr. Simpkinson and Mr. Abram, for the first motion.

Mr. Bethell, for the cross motion.—It is attempted to be said that this ground plan formed no part of the particulars. At the least, it was a deliberate representation held out by the vendors at the time of the sale, on the faith of which, the parties were induced to bid. The particulars deposited in the Master's office, have this plan annexed to them, and they have this indorsement, "I agree to give for the premises in Lot 3, —*l.*, upon the conditions of the particulars and the schedule. J. Nash." The auctioneer has made an affidavit that he intimated to the company, that though the vendors had exhibited a plan, yet they would not be bound by the exact measurements; but courts of justice have repudiated the notion, that what an auctioneer may say can do away with written representations. The purchaser also swears that he heard no such statement, and that he was unacquainted with the premises, except by the ground plan. The purchaser is to be protected against any misrepresentation of the vendor, however innocent, by which, he has been led into mistake.

Mr. Simpkinson and Mr. Abram, contra.—The particulars do not describe the premises as "ground," but as certain freehold dwelling-houses, containing so many chambers, &c. The particulars did not refer to the plan, which was merely intended to enable the purchaser to form a general opinion.

LORD ABINGER, C.B.—The purchaser does not swear that the overlapping of the house could not be discerned by the eye, and the plaintiff does not swear that it could. If the case rested entirely upon that question, I should be glad of further inquiry; but it appears that there is not the quantity of ground, or the number of houses specified in the plan, and it appears that these cannot now be given to the purchaser. I cannot entertain the question, that the plan was not to be abided by. I can understand an auctioneer saying, that in some specified point, the particulars are not to be followed, but he is bound by the general description; otherwise, the plan was put forth only with intent to deceive. As to the overlapping of the adjoining house, there is a want of a direct negation or averment on either side; but on the balance of testimony, it appears that, in the purchaser's opinion, he was to have the whole superincumbent mass. Now he has the ground, but not all that was standing upon it. But, upon the other part of the case, it appears that some out-houses are omitted in his conveyance, and, therefore, I am of opinion, that Nash is entitled to be relieved from his purchase as to Lot 3. This is not a case for costs, as the purchaser ought to have applied long ago.

ALDERSON, B. } BOULTER v. BRODERIP.
July 6.

Executor—Renewal of Promissory Note.

An executor had improperly invested money of his testator on a promissory note. On the executor's death, his executrix renewed the note to herself. She was ordered, upon motion, to pay the sum into court as money received by her, and lent out again.

The testator, Boulter, by his will, gave all his personal estate to his trustees and executors, upon trust, among other things, to invest 4,000*l.* upon government securities, and pay the dividends to his wife for life, with remainder to his four daughters. The executors proved the will, and possessed themselves of all the personal estate, which they distributed, except the 4,000*l.* It appeared, that Thomas Broderip, the surviv-

ing executor, had lent out part of this sum upon promissory notes. He died, leaving his widow, the defendant, Elizabeth Broderip, his executrix. A bill was filed for the administration of Boulter's estate. The answer of the defendant Elizabeth B. admitted assets of her late husband, and also that since his death she had renewed one of the promissory notes for 450*l.*, and had taken the fresh security to herself.

Mr. Sutton Sharpe now moved, upon the admissions in the answer, that this 450*l.* might be paid into court, as money received by the defendant personally, and not invested according to the trusts of the will.

Mr. Campbell, for the defendant, contra.
—This is a motion upon the admissions in

the answer, and the cases have never gone further than this, that the money must either be admitted to be in the hands of the party, or of his banker, or in a partnership in which the defendant is a partner, or it must be money that has been received by the defendant—*Vigrass v. Binfield* (1), *Collis v. Collis* (2), otherwise it is matter of decree.

ALDERSON, B.—If the executrix chooses to renew a promissory note, instead of calling in the money, she must be taken to have received it and lent it out again. The 450*l.* must be paid into court within a limited time.

(1) 3 Mad. 62.

(2) 2 Sim. 365.

END OF THE REPORTS IN THE COURT OF EXCHEQUER IN EQUITY.

By the statute 5 Vict. c. 5, entitled "An Act to make further provisions for the Administration of Justice," the jurisdiction of the Court of Exchequer, as a court of equity, was abolished, and was transferred to the Court of Chancery, from the 15th day of October 1841; and Her Majesty was empowered to appoint two additional Judges assistant to the Lord Chancellor, each of such additional Judges to be called Vice Chancellor.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Bankruptcy.

BY
CHARLES STURGEON, Esq., BARRISTER-AT-LAW.

FROM MICHAELMAS TERM, 1840, TO TRINITY TERM, 1841,
BOTH INCLUSIVE.

CASES ARGUED AND DETERMINED

IN THE

Court of Bankruptcy.

COMMENCING WITH

MICHAELMAS TERM, 4 VICTORIÆ.

1840. } *Ex parte* DAVENPORT AND
Nov. 5, 25. } OTHERS in the matter of
JAMES, JOHN, AND THOMAS
BUXTON.

Petition—Estoppel—Mistake of Rights.

A creditor, who knew not that he had a choice of rights, presented his petition to enforce the right of which he was aware, and obtained the order which he desired; but nothing was done under that order. Afterwards learning that he had another right, which he might have pursued, more advantageous to him, but inconsistent with the former order, he presented his petition to enforce that right, not having had the former order rescinded:—Held, per Curiam, that the former order of the Court limited the rights of the parties, whatever their strict rights might have been, and that the latter petition must be dismissed, with costs.

This was the petition of Sir Salisbury Davenport and James Newton, who were trustees for the Manchester and Liverpool District Banking Company, and Samuel Walker, one of the directors of the said company. It stated, that a fiat had issued against the said bankrupts, under which

they were declared bankrupt; that at the time of their bankruptcy they were indebted to the banking company in the sum of 5,723*l*; that some time prior to their bankruptcy, the said banking company took, as a security for their advances, an equitable mortgage, limited to 5,000*l*. on certain hereditaments and premises, the separate estate of James Buxton and John Buxton, two of the said bankrupts; that proof was tendered on behalf of the said banking company before the commissioners under the said fiat, but that the commissioners rejected such proof, except as to the sum of 723*l*. 4*s*. 9*d*. (being the excess of their debt over and above the sum covered by the said mortgage), alleging that the banking company were not entitled to prove such debt, and hold their said security. The petitioners submitted that they were entitled to prove the whole of their debt against the joint estate of the three bankrupts, notwithstanding such separate security of the two; and the petition prayed that they might be at liberty to do so.

Upon the petition coming on to be argued upon the only question raised in the petition, viz. as to the right to prove against the joint estate of the three bank-

B

rupts, retaining the security upon the estate of the two, it was objected by—

Mr. Anderdon, on the part of the assignees, though this was not stated upon the petition, that the petitioners having, immediately after the opening of the said fiat, and prior to their application, stated to have been made on behalf of the banking company to the commissioners for liberty to prove against the joint estate as aforesaid, presented a petition to this Court in the same matter, which prayed that they might be declared equitable mortgagees of the premises comprised in their said security, and that the premises might be sold and applied in payment of their said debt, and that they might be at liberty to prove for the deficiency, if any, and having obtained, upon that petition, the usual order, declaring the banking company equitable mortgagees, with liberty to prove for the deficiency, were estopped now by their former petition, and by an order drawn up thereon, dated the 6th day of August last, from claiming any relief other than or inconsistent with their former petition and order.

Upon this state of things the Court thought it right that the present petition should stand over, for the purpose of allowing the petitioners to explain under what circumstances the order of the 6th of August, which was inconsistent with the object of the present petition, was obtained.

Nov. 25.—This petition came on again to-day, when the affidavit of Wm. Heaton, the petitioner's solicitor, was read. He stated—

“That in obtaining the order, dated the 6th of August last, in this matter, and in preparing the petition on which the same was founded, it was through misapprehension of their rights that the petitioners applied for and obtained the liberty to prove only for the deficiency of their mortgage debt, after the realization and sale of the mortgaged premises therein mentioned, instead of applying to prove their whole debt, and realize their said mortgage security also; and it was not until after such order had been obtained, that such misapprehension was discovered or adverted to. That immediately on deponent adverting to the fact, that the said

petitioners had a right to prove their whole debt as aforesaid, deponent applied to have the said petitioner's proof admitted for the whole amount of their debt, covered by the said equitable mortgage, against the joint estate of the three bankrupts, on the ground of the property comprised in the said equitable mortgage being (as the fact is) only the separate estate and property of James Buxton and John Buxton, two of the said bankrupts; that in obtaining the order heretofore mentioned, or in anything which has since taken place, it was not meant or intended by deponent, nor, as deponent verily believes, by or on behalf of the petitioners, or any of their agents, to waive the right of the petitioners to prove the whole of their said mortgage debt against the joint estate of the said three bankrupts, or otherwise to waive any of their rights as joint creditors of the said three bankrupts, nor in any manner to elect to go in under the said fiat, and prove for such deficiency only as aforesaid, instead of proving for the whole of their said mortgage debt generally, without deducting or giving up or first realizing their said mortgage security; that if it had occurred to deponent, or been suggested by any one to him in the course of obtaining the said order, that the said petitioners had or could claim such right of proof against the joint estate of the said three bankrupts for the whole of their said debt, without deducting or giving up, or first realizing their said security, deponent verily believes that the said application would not have been made for liberty to prove only for such deficiency as aforesaid, but the petitioners would, in the first instance, have applied for and prosecuted their general right of proof of their said whole debt, without restriction; that in the proceedings before the commissioners, on the 7th of August last, to obtain the admission of such proof for the whole of the said debt, the only question agitated, regarding the proof of the whole of the said debt, was, as to the effect of the petitioners' holding such mortgage security as aforesaid, or their right to prove the same debt, which was covered by such mortgage, and it was never, to deponent's knowledge and belief, until the hearing of the petition now pending in this matter, suggested that

the said order had precluded or affected the petitioner's right of proof for the whole of such debt, and deponent believes it was not considered necessary, under the circumstances aforesaid, to state such order in the said petition now pending as aforesaid, nor is such order at all adverted to in the affidavit filed in opposition to the said petition; that the said order has never been in any manner acted upon in respect of the liberty thereby given to go in and prove for such deficiency as aforesaid."

Affidavits to a similar effect were made by the petitioners.

[SIR JOHN CROSS.—This only proves a misapprehension of law, and not of fact. The solicitor thought they ought to apply, in the first instance, for the sale, and to prove for the residue, but afterwards he changed his opinion.]

Mr. Swanston and Mr. Rogers, for the petitioners.—The solicitor thought at that time that they had not the right which he now discovers that they had. The question is, whether, when he applied for the order, he entertained the opinion that they had that right, and that only; or did he know of another existing right, and then elect between the two? The affidavits prove that he had not that knowledge of the different rights; he therefore could not have elected for his client.

[SIR GEORGE ROSE.—In a late case in the Exchequer—*Rome v. Younge* (1), the vendors of an estate obtained a decree for specific performance, and a declaration, that if the money were not paid by a certain day, the estate should be sold, the proceeds paid to the plaintiffs, and the purchaser be personally liable for the deficiency. The purchaser died insolvent before the day fixed for payment, and a creditors' suit was instituted; the vendors filed a bill of revivor and supplement, to have the benefit of the creditors' suit, and then petitioned to be at liberty to prove the whole amount of the purchase-money as creditors by decree, and to be declared to have a lien upon the estate for deficiency. An order was made upon that petition, that the estate should be sold immediately, reserving the question of the amount of proof. The Lord Chief Baron considered,

(1) 9 Law J. Rep. (N.S.) Exch. Eq. 41.

that whatever the strict rights of the parties might have been, yet the vendors having taken the decree by consent, were bound by it; and allowed proof for the balance only. I cannot distinguish that case from the present. The objection there was attempted to be met, by saying, "We will get rid of that decree;" but the Court said, "We cannot relieve you from that state of things." Again, in the case of *Ex parte Downes* (2), where a mortgagee had given up his security, and had been admitted to prove, but afterwards presented his petition, praying to be at liberty to withdraw his proof, and have the benefit of the mortgage, the Lord Chancellor said, it was dangerous to allow a mortgagee to retract his election, after having had the benefit of his proof; and he dismissed the petition.]

[SIR JOHN CROSS.—The parties come, in the first instance, to this Court for the common order to sell the security, and prove for the deficiency. They then change their minds, and go before the commissioners, claiming to prove their whole debt and retain their security. The commissioners refuse this, and then they present their petition to this Court, suppressing the fact, that they had obtained an order totally inconsistent with their present claims, and which order is still in force; and the parties, without having that rescinded, pray for an order quite at variance with it. The assignees are brought here twice, and then they are told, "We will apply to the Court to rescind the former order." Have not the assignees a right to insist that the taking of that order was an election of the petitioners?]

The petitioners might have discharged the order the next day. If the order had been acted upon by them, and so had affected the rights of other parties, then they could not have asked for the benefit of the proof; but now the only effect of abandoning the order is, to make the petitioners pay the costs. The reason of the case in the Exchequer was, that the party who had obtained the order had acted upon it, and could not place the other parties in the same condition as before. The order here only gives the petitioners liberty to go in and prove for the difference; but they do

(2) 18 Ves. 290.

not wish to do so. If, indeed, there had been a positive order that they should go in, then the petitioners could not recede, it being prejudicial to the other side. In *Edwards v. Morgan* (3), the Lord Chief Baron said, "that the Court could never hold persons to have made an election, without fully understanding that they were cognizant of the nature of the rights between which they were to choose, and of the claim upon them to elect; and that in consequence of the knowledge they did actually elect." And again, in *Dillon v. Parker* (4), it was decided, that in order to constitute election, one must imply a knowledge of the rights, and an intention to elect; and in *Ex parte Husbands* (5), the Lord Chancellor held, that a holder of bills having proved against the joint estate, might, after a declaration of dividend of the joint estate, retire from that proof, and prove against the separate estates. There the party proved in ignorance of his rights, and had voted in the choice of assignees. The petitioners then have brought themselves within the rule settled by these cases, for the affidavit of Heaton states, that it was not the intent of them to elect, as to their rights, as the application to be declared equitable mortgagees would not have been made, if they had known that a creditor could have proved against the joint estate of three bankrupts, retaining the security of two.

[SIR GEORGE ROSE.—This is not a case of election. There was nothing to elect. They have bound themselves up by the order: and whether they can get themselves released, is the question.]

Mr. Anderdon, for the assignees, relied upon the cases of *Ex parte Downes*, *Ex parte Eggington* (6), and *Rome v. Young*, cited by Sir G. Rose, but was not called on to argue the question.

SIR JOHN CROSS.—It is insisted, on the part of the assignees, that as the petitioners have got an order for sale of the security prior to the proof, we can do nothing at variance with that order. It is said, on the other side, that the Court will assist

a person who in a mistake has prejudiced his rights. That is true, where the party has done so through ignorance of facts; but here it was solely a change of opinion; and if a mistake at all, it was only a mistake in law. So whether there was a mistake or not, the parties are bound by that order, for *ignorantia legis non excusat*.

SIR GEORGE ROSE.—When this petition was first before the Court, it was opened as a question, whether the petitioners had a right to prove, retaining their security. They were met by the objection, that they must first realize their security. If it now stood to be decided upon that point, it would be well known by the profession what the respective opinions of the Court would be. But the assignees now meet the petition by objecting that there is an existing order of the Court at variance with the order for which the petition prays; and it appears to me, that the assignees are not to be charged with rashness or unnecessary opposition in relying upon this order. Therefore, taking it thus, the question is, what are we to do here, the parties having got a beneficial order? I cannot but think that we are bound by that case in the Exchequer, *Rome v. Young*, which was a stronger case than this; and it is impossible, in accordance with *Rome v. Young*, to relieve the case from the difficulty of that order. The express order of the Court limits the rights of the parties, *whatever* their strict rights might have been. There is no ground whatever for supposing that error or negligence is to be imputed to the solicitor, for he did what ninety-nine solicitors out of the hundred would have done; he acted in accordance with every-day practice.

Petition dismissed, with costs.

1840. }
Nov. 13. } *Ex parte RANDALL re SHIRLEY.*

Solicitor—Taxation of Bill—Practice.

The common order for taxation of the solicitor's bill, will not be varied, except under special circumstances.

This was the common petition to tax the solicitor's bill of costs.

(3) M'Cl. 551.

(4) 1 Swanst. 359.

(5) 2 Gl. & Jam. 4.

(6) 1 Mont. 72.

Mr. Bacon, for the petition, asked the common order.

Mr. Anderdon, for the solicitor, submitted, that the order should not contain the direction which provided by anticipation for the payment of costs; but that the order should reserve the consideration as to the question of costs. He observed that the Court had done the same thing in a late case—*Ex parte Ainsworth re Walker* (1), and had varied the order to that effect.

Per Curiam.—The common order must stand according to the settled practice of the Court, which is a convenient practice, and a saving of expense. Should misconduct take place, there is nothing to prevent either side coming to this Court to set it right. The order must stand, the costs following the taxation.

1840. { *Ex parte* JOHN BOSTOCK AND
Nov. 14. { OTHERS, in the matter of
 GEORGE WHITEHEAD, A
 BANKRUPT.

Fiat—Supersedes—Concerted Act of Bankruptcy—Assignees' Title.

Although an act of bankruptcy concerted between the bankrupt and the petitioning creditor, cannot support the fiat as regards the petitioning creditor, nor can that petitioning creditor substitute another act of bankruptcy, still, where a considerable time (four months) has expired since the date of the fiat, and the assignees have taken various proceedings under the fiat, the Court will allow the title of the assignees to be made good by a subsequent act of bankruptcy, and will not supersede for the purpose of issuing another fiat, unless it appears that the property can be better administered under the new fiat.

Semble—per Sir George Rose—That even where there is no such other act of bankruptcy to substitute, the fiat ought not to be superseded, if the creditors do not allege that they are in any way aggrieved by the proceedings.

This was the petition of several creditors of the bankrupt, and it prayed, that the

fiat issued against the bankrupt might be annulled, and that one or more of the petitioners might be at liberty to issue a new fiat against him; and that the former petitioning creditor, W. M. Papineau, or the bankrupt, might be ordered to pay the costs of annulling the former fiat. It stated, that a fiat in bankruptcy, dated the 18th of May last, had issued against the bankrupt, upon the petition of W. M. Papineau; that the act of bankruptcy upon which the fiat had issued, was the execution, by the bankrupt, of an indenture of assignment, dated the 16th of May last, of all his estate and effects to certain trustees, for the benefit of all his creditors; that the petitioners had proved their several debts under the fiat, supposing it to be a valid one, but that they had since discovered that the indenture of assignment was executed by the bankrupt, and with the privity and counselling of W. M. Papineau, solely for the purpose of being used as an act of bankruptcy, to issue a fiat upon. The petition was not presented until September. The evidence clearly went to prove, that the act of bankruptcy was concerted between the bankrupt and W. M. Papineau, the petitioning creditor; and that there were other acts of bankruptcy committed by the bankrupt, subsequently to the assignment. There was no statement in the petition, nor any evidence to lead the Court to suppose, that the assignees had been guilty of misconduct in the management of the estate, nor that any property could be got in under a second fiat, which could not under the first.

Mr. Swanston, Mr. K. S. Parker, and Mr. James, for the petitioners.—The rule of law is settled in the case of *Marshall v. Barkworth* (1), where Lord Denman, C.J. said, "I take it to be clear, that where the thing done as an act of bankruptcy, is done by concert with a particular creditor, he cannot afterwards come into court, and set that up as an act of bankruptcy." The act of bankruptcy then, in this case, was clearly done by concert with a particular creditor; consequently, in accordance with Lord Denman's decision, it cannot be set up as an act of bankruptcy. The fiat, therefore, wants one of the legal requisites to

(1) 4 B. & Ad. 512; s. c. 2 Law J. Rep. (N.S.) K.B. 75.

(1) Not reported, except in 4th Jurist, 635.

support it, and consequently must fall to the ground. The other side endeavour to support it upon another and subsequent act of bankruptcy; but Lord Eldon, in the case of *Ex parte Prosser* (2), refused to allow this substitution; his Lordship said, "An application is now made for a new trial, and that other acts may be proved. Upon looking into the proceedings, I see that other acts than those which were concerted, may be substantiated. I agree to the case cited by Mr. Bell, which was in the bankruptcy of a person of the name of Brown, who was agent to the Duke of Northumberland. That commission was taken out upon a concerted act, but at the trial at law, evidence was admitted of other acts not concerted. And I agree to the proposition, that it is not necessary to give evidence at law, of the particular act proved before the commissioners. But it is a very different question, whether the Court, to which the jurisdiction in bankruptcy is intrusted by the legislature, will support a commission founded in a fraud practised upon the Court. It has been said, that it would be extremely beneficial to all parties to let this commission proceed. I feel that; but I will not, on account of a particular inconvenience, give any countenance to a proceeding which the law binds me to say is illegal and fraudulent." There is, in this case then, according to Lord Eldon, an illegal fiat, which should not stand; and, if the Court requires more, the petitioners are willing to pledge themselves to take out another fiat.

[SIR G. ROSE.—There is no question but that the concert is fully proved; but where a fiat has gone on so long as this has, and property has been got in under it, and that, property may be administered under the fiat, have you any authority for saying that, merely from the circumstance of a concerted act of bankruptcy, such a commission will be superseded? If, indeed, you could shew that you cannot get property in under a fiat grounded upon this act of bankruptcy, which you could under another, that would be a very different question. But what right have other creditors to say to the assignees, who are also creditors, You shall not support this fiat? Who

is to benefit under this fiat, who would not have an equal right under another?]

Back v. Gooch (3) and *Ex parte Brookes* (4), were cited.

[SIR G. ROSE.—That case has no application to the present state of things. That was the adverse petition of a creditor to get rid of the bankruptcy altogether.]

If the assignees were to bring an action of trover to recover bankruptcy assets, it would be necessary for them to prove the trading, the act of bankruptcy, and the petitioning creditor's debt; but clearly, in a court of law, the assignees in this case could not recover, as they would fail in establishing the assignment as a good act of bankruptcy — *Bamford v. Baron* (5). But if they attempted to rely upon another act of bankruptcy, it must be during the same petitioning creditor's debt; and any other which they might set up, must be affected by that concerted act of bankruptcy. It would be dangerous to hold that such a petitioning creditor may put another act of bankruptcy upon the proceedings. At all events, the Court will not support this fiat, without some further inquiry being directed.

[SIR J. CROSS.—The question is, is this a concerted act of bankruptcy? and, if so, will the Court suffer a fiat so sued out upon it to be prosecuted? Now, if the act of bankruptcy has been concerted, and there is another act of bankruptcy proved, although the petitioning creditor cannot set up that other act of bankruptcy, yet the assignees might support the fiat by it. But it will be necessary to shew another act of bankruptcy; at present we have evidence enough of concert.]

Mr. Anderson, contra, read affidavits proving subsequent acts of bankruptcy.

SIR J. CROSS.—The question then is, will the Court, under all the circumstances, supersede this fiat? It is said, that this was a concerted act of bankruptcy, and that therefore the fiat is invalid. I do not hold that to be a legal consequence; but it appears to me that the assignees might support this fiat at law by another act of bankruptcy; and if they can maintain it, there

(3) *Holt's N.P.C.* 13.

(4) *Buck*. 257.

(5) 2 *Term Rep.* 594, n.

(2) *Buck*. 79.

can be no reason to supersede. Besides, under all the circumstances, it appears to me, that no advantage could arise to the creditors from superseding. Therefore this petition must be dismissed, but, I think, without costs.

SIR GEORGE ROSE.—If there be an act of bankruptcy, unconnected with this petitioning creditor, why cannot the assignees take advantage of it? It is a very different question, when between the bankrupt and the petitioning creditor, and the bankrupt and a stranger. But the question here is, the title of the assignees to the property: the Court therefore in this case has to deal with a stranger. The Court will exercise a larger discretion, looking upon it as a question of assignees' title, than it would be inclined to use towards a petitioning creditor, circumstanced as in the present case. The question here is not bankruptcy or no bankruptcy, for the bankruptcy is not disputed; but merely a technical nicety as to whether this fiat is to be maintained, or a new fiat issued grounded on another act of bankruptcy. For what object should this fiat be cut down? The assignees, as creditors, say they want the property to be administered under this fiat; the petitioners desire it to be administered under another. The only object of the petition is, to have one fiat instead of another. The granting of a supersedeas is always discretionary with the Court; even where the fiat is invalid at law, this Court has maintained it. The mode to deal with this case is, not to call upon the assignees to prove that there is no concert, but upon the petitioners to prove the affirmative proposition. In an action brought by the assignees to recover property, it would be idle of the defendant to deny the act of bankruptcy; he would have to prove the concert; the assignees' title would be proved by the evidence of the attesting witness: the defendant would find it hard to cut it down by the cross-examination of the attesting witness. It appears to me, that if I am not wrong in saying that the assignees, not being connected with the petitioning creditor, might support this fiat upon this act of bankruptcy, no doubt they might upon another act of bankruptcy. It is therefore brought to this, that even if convenience did not call upon us not to supersede, still there exists

no right against the assignees to supersede. I have no hesitation in saying, that the title of the assignees is made good by another act of bankruptcy; but I would go further and say, that even where there was no such other act of bankruptcy to substitute, I would not supersede where the creditors did not state that they were aggrieved by the conduct of the assignees. What then can be gained by this petition, but an increased expense? I think that these parties ought to pay the costs.

The petition dismissed without costs, the costs of the respondents to be taken out of the bankrupt's estate.

1840. } *Ex parte* JOSEPH MALACHY *re*
Nov. 14. } JOSEPH MALACHY.

Account—Surplus—Petition to remove Assignees, and for an Account.

Upon the petition of a bankrupt for an account and removal of the assignees, though it is necessary that a surplus should be alleged, yet it is sufficient if such allegation appears by necessary inference upon the petition.

This was the petition of the bankrupt. The object of it was to have the assignees removed, and new assignees chosen, the old assignees accounting. The petition stated, that a fiat had issued against the petitioner, on the 10th of February 1838, under which he was duly declared a bankrupt; that George Hawtayne and John Rees were chosen assignees; that the debts proved amounted only to the sum of 3,301*l.*, but that the assets appearing upon the face of his account, amounted to the sum of 34,223*l.* 19*s.* 6*d.*; that the assignees had compromised a debt due to the bankrupt, amounting to the sum of 16,277*l.* 6*s.* 9*d.*; that they had received various sums due to the estate, for which they had not accounted, but retained the same in their hands for their own purposes; that they had neglected and omitted to get in the remaining debts and assets due to the estate of the petitioner; that the petitioner obtained his certificate on the 11th of September 1838; and that the remaining assets, if duly got in and realized, would

pay the creditors 20s. in the pound, upon the amount of their respective debts.

The assignees filed affidavits in opposition, which denied all the charges made against them, with respect to compromising the debts to the estate, and also as to the negligence in getting in the assets, and stating that their counsel were of opinion, that the greater part by far, of the said debts, was not recoverable; and that such debts as were, so far from paying the creditors 20s. in the pound, would scarcely pay the heavy expenses already incurred. The affidavits then stated, that neither the petitioner nor any of his creditors had ever applied to them for an account, or to the commissioners to appoint a meeting, to take the accounts of the assignees; nor had any creditors of the petitioner ever complained to deponents, the assignees, of any delay or neglect in the management of the petitioner's estate.

Mr. Girdlestone and Mr. Keene, for the petitioner.—The other side do not deny that these debts, are due to this amount; but they say, that under the circumstances, they do not think it advisable to bring actions to recover them.

Mr. Swanston and Mr. Anderdon, for one assignee.—This petition was unnecessary. The petitioner might have applied to the commissioners, and they would have appointed a meeting of the assignees, and have inquired into the matter. The rule is, that wherever there is a primary remedy provided, that remedy must in the first instance be resorted to, and no application has been made to the commissioners. Besides, the only ground upon which the bankrupt is entitled to such an inquiry, is upon that of an alleged surplus, but in this petition there is no such statement.

Mr. Bacon, for another assignee.

Mr. Girdlestone, in reply.—There is no doubt that the plain inference from the statements in the petition is, that a surplus is alleged. Then the question is this, is there to be an opportunity given to realize this property?

SIR G. ROSE.—The only ground upon which the bankrupt could come here with this petition, is that of a surplus; but though the petition does not positively allege a surplus, yet, from the plain infer-

ence of the petition it appears, that such is by necessary implication alleged. It appears to me, that what he is to get upon this petition, he could not have got from the commissioners. There is nothing to exclude him from coming here in the first instance, upon the ground of a surplus.

SIR J. CROSS.—The Court is not particular where the bankrupt is a certificated bankrupt, but where he is not so, the surplus should be specifically alleged. It seems to me that the bankrupt is entitled to the order, to inquire into the circumstances of the outstanding estate, with liberty for him to bring actions in the names of the assignees, giving them an indemnity.

Ordered accordingly.

1840. } *Ex parte NICHOLSON re*
Nov. 24, 25. } *SHEPARD.*

Proof—Guarantie—Stamp.

A guarantie, though not stamped at the date of the bankruptcy, may be proved when stamped.

A question arose in this case, whether the petitioner could prove against the estate of the bankrupt, on a guarantie given by the bankrupt, for the payment of certain bills by another party. The guarantie was not stamped when the petition came on, and it stood over to give an opportunity to have it stamped.

Mr. James Russell, for the assignees, objected, that as the guarantie was not perfect at the time of the bankruptcy, by reason of not being stamped, that no subsequent proceeding could make it good.

SIR J. CROSS.—You cannot look at the date of a stamp. Before being stamped it cannot be admitted in evidence—that is the only objection to it (1).

SIR G. ROSE.—It is perfectly admissible when stamped, though it was not stamped at the date of the bankruptcy.

(1) See *Burton v. Kirkby*, 7 Taunt. 174; *Doe v. Roe*, 5 B. & Ald. 768; *Huddleston v. Briscoe*, 11 Ves. 595; *The King v. Preston*, 5 B. & Ad. 1028, s. c. 3 Law J. Rep. (n.s.) M.C. 58.

1840. } *Ex parte* SAMUEL BISDEE *in re*
 Nov. 7. } JOHN BAKER.

Mortgage—Equitable Mortgage—Memorandum.

One owner in fee of an estate, subject to a mortgage, and also entitled to two-thirds of another estate, deposited the title-deeds relating thereto, to secure a debt. Afterwards, he wrote a letter to the deposites in the following terms:—"Dear Sir, I will thank you to send by the bearer the deeds I called for last Saturday, in Bristol. You will retain the Butcombe deeds and the bond. Those you let me have, shall be returned again about the middle of the month; and this in the meantime shall be my receipt for them, and undertaking for re-delivery." Subsequently, he redeemed the prior mortgage, and took a surrender of the term. Of the other estate, he procured a partition, giving 100*l.* for equality of partition. Neither of the deeds by which these alterations were effected, was deposited with the creditor. The debtor became bankrupt:—Held, that the letter was a sufficient memorandum in writing; and also, that the equitable mortgage extended to the estate freed from the prior mortgage, and to the estate received in partition.

This was the petition of Samuel Bisdee. The petition stated, that in the year 1831, the bankrupt Baker, borrowed the sum of 1,800*l.* from the petitioner, upon the bond of the bankrupt, and upon the deposit of certain title-deeds, one of which related to two third parts or undivided shares of certain lands and premises, situate in the parishes of Blagdon and Butcombe, in the county of Somerset; another to the entirety of the equity of redemption of certain other lands in Blagdon, which were at that time subject to two mortgages; and a third related to certain premises called the Steep Holmes. That in 1833, the bankrupt borrowed the title-deeds relating to the property called the Steep Holmes, having written the following letter to the petitioner:—"Dear Sir,—I will thank you to send by the bearer the deeds I called for last Saturday, in Bristol. You will retain the Butcombe deeds and the bond. Those you let me have, shall be returned again about the middle of the month; and

this in the meantime shall be my receipt for them, and undertaking for re-delivery." That, instead of returning those deeds, the bankrupt sold the property to which they related. It further appeared from the petition, and the affidavit of the bankrupt, that in the year 1833, the bankrupt paid off one of the mortgages upon the first-mentioned estate, and took a surrender of the mortgage term to himself; and that about the same time he obtained a partition of the estate, the title-deeds to two-thirds of which he had deposited with the petitioners as above stated, he giving 100*l.* for equality of partition, which the bankrupt, in his affidavit, stated he paid for the purpose of increasing the security of the petitioner, on account of his having taken away the title-deeds relating to the Steep Holmes, and by so doing, having reduced the security of the petitioner.

Neither the deed surrendering the mortgage term, nor the deed of partition, was deposited with the petitioner; but, upon the bankruptcy of Baker, they passed into the hands of his assignees. The petition prayed that Samuel Bisdee might be declared equitable mortgagee of the premises as they now stood.

The question was, what portion of the proceeds of the sale of the property should go to the petitioner; that is, whether the petitioner was equitable mortgagee of the premises as they now stood, or only as they stood prior to the mortgage being paid off, and the partition being effected.

Mr. Rogers, for the petitioner.—The petitioner is entitled to the premises as they now stand. If a mortgagor pays off a prior mortgage, that is for the benefit of the subsequent incumbrancers. In *Toulmin v. Steere* (1), the Master of the Rolls mentioned the cases of *Greswold v. Marsham* (2) and *Mocatta v. Murgatroyd* (3), as express authorities to shew, that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrancers of which he had notice. That brings it to this: if a person who has an interest, deals with that by buying off an incum-

(1) 3 Mer. 224.

(2) 2 Ch. Ca. 170.

(3) 1 P. Wms. 393.

brance, it operates for the benefit of the inheritance; by the first mortgagee being satisfied, the second becomes the first.

[SIR G. ROSE.—This is not exactly the same case; here, you seem to contract for a specific thing.]

The question of contract does not arise; the assignees could never have redeemed this estate, without paying the incumbrances in full. The next question will be as to the money paid by the bankrupt for equality of partition. The bankrupt himself states, that he paid it to increase the security of the petitioner. The prayer of the petition is founded upon general principles. If a trustee renew a lease, the trust will attach upon that; so, if a mortgagor of a share of an estate make a partition, and get an entire portion, the mortgage will attach upon that. In the same way, there having been here an equitable mortgage by the owner of an undivided share of an estate, and a partition having been effected, the petitioner is entitled to the benefit of that partition.

Mr. Osborne, for the assignees.—The question is, what interest will the petitioner take by the sale of the property comprised in the deeds. One part of the property was a freehold estate, as to which, the bankrupt was only entitled to the equity of redemption; and the deed conveying this to him was deposited by him with the petitioner; therefore, all that he contracted about, was for what he then owned, namely, the equity of redemption. Then as to the partition, surely the bankrupt cannot, by now saying that he paid the 100*l.* to increase the security of the petitioner, prejudice his other creditors to that amount.

Mr. Rogers, in reply.

SIR J. CROSS.—It seems to me, that as to the first property, of which, the bankrupt was owner in fee, the petitioner is entitled to it, freed from the mortgage which has been paid off by the bankrupt; and as to the second, which has undergone a partition, I am equally clear that he is entitled to that also, as it now stands.

SIR G. ROSE.—The order must be the common order. The only question in this case, is a question of fact, as to the extent

of the contract. And I think, that the contract was quite large enough, for all that the bankrupt had deposited, and the memorandum is also large enough. I am therefore of opinion, that the contract was not intended to limit the security to the property, as it stood at the date of the deposit, and that consequently the property as it now stands is the petitioner's security.

1840. } *Ex parte* ULLATHORNE AND
Nov. 7. } OTHERS *in re* REED.

Petitioning Creditor's Debt, Substitution of—Costs.

A petitioning creditor who had sued out a fiat before he actually became a creditor of the bankrupt, ordered to pay the costs of substituting a good petitioning creditor's debt.

This was the petition of several creditors of the bankrupt; and it prayed that their debt might be substituted in the place of the old petitioning creditor's debt.

In this case, the petitioning creditor had sued out the fiat before he was actually the creditor of the bankrupt. The facts were shortly these: the petitioning creditor was the drawer of certain bills of exchange accepted by the bankrupt; he, concluding that the bills could not be paid by the bankrupt, directed his bankers to pay his bills when due; they became due on the 15th of June, and were paid by the advice of the petitioning creditor. He having sued out the fiat upon the 11th, four days before the bills came into his hands, this petition was presented, for the purpose of substituting a debt prior to the date of the fiat. The only question was as to the costs.

Mr. Anderdon, for the petitioners.

Mr. Hubback, for the assignees.

Mr. Bates, for the petitioning creditor, submitted, that the costs of substituting a petitioning creditor's debt should always come out of the estate, unless where fraud could be proved against the petitioning creditor.

Sed per Curiam.—The petitioning creditor must pay the costs of this application, and of setting all matters right.

1840. } *Ex parte* JOHN COOPER AND
 Nov. 23. } ANOTHER in *re* ROBERT
 } JOHNSTON AND EDMUND
 } ROWE DANSON, BANKRUPTS.

Partners—Order and Disposition—Conversion—Practice.

After dissolution of a partnership, the continuing partner remained in possession of the partnership effects, down to the time of the bankruptcy, but without any assignment thereof having been made to him, and carried on the business upon his separate account, though in the partnership name:—Held, that this property was to be administered as the joint property of the partnership. And that the 72nd section of the Bankrupt Act, as to reputed ownership, did not apply as between partners.

Per Sir G. Rose—Where upon a dissolution, the property is assigned or agreed to be assigned to the continuing partner, then the property will be converted; but if the agreement be only executory, the property will not be converted.

The judgment of this Court may be taken upon the rights of the parties, although the commissioner has not given his judgment thereon.

This was the petition of John Cooper and John Feltham, on behalf of themselves and the other joint creditors of the bankrupts; and it prayed, that the joint estate of the bankrupts, which remained in specie and in the possession of the bankrupt R. Johnston, at the time of the bankruptcy, might be declared to form part of the joint estate of the bankrupts, and be applied in payment of the petitioners, and the other joint creditors of the bankrupts.

The petition stated, that the bankrupts had carried on the business of wholesale ironmongers, in co-partnership together, for several years, under the firm of "Robert Johnston & Co." That by articles of agreement in writing, dated the 13th of March 1839, after reciting, among other things, their intention to dissolve partnership, it was agreed, that the bankrupts should continue to carry on their said business until the 31st of December then next ensuing. That in pursuance of that agreement, a notice of the dissolution of the said partnership, and signed by the

said bankrupts, was published in the *London Gazette*, on the 3rd of January 1840; and which notice stated, that the debts due to and by the said firm would be received and paid by the said Robert Johnston. That from that time down to the 8th of May 1840, on which day the present fiat issued against the bankrupts, the bankrupt Robert Johnston continued to carry on the said business by himself, and on his own separate account, on the same premises, and under the same firm of Robert Johnston & Co.; but, that no assignment of the property of the said partnership was at any time made to him by the bankrupt Danson.

The petition then stated, that the petitioners had proved their debt against the joint estate of the bankrupts; but that at a meeting held for declaring a dividend, a question having been raised as to whether the partnership property, which remained in the hands of the bankrupt, Robert Johnston, from the 31st of December 1839, down to the time of the bankruptcy, should be applied in payment of the joint creditors of the bankrupts, or the separate creditors of Robert Johnston, the commissioner being of opinion that the joint creditors were entitled, adjourned the declaration of a dividend, in order that the question might be brought before this Court for its decision.

The affidavit of the bankrupt E. R. Danson stated, that after the said notice of dissolution was signed, deponent ceased to attend at the premises where the co-partnership had been carried on, deponent leaving the said R. Johnston to wind up the affairs, and that on his retiring from the said co-partnership on the 31st of December, deponent left the goods, chattels, book debts, and all other the estate and effects of the said co-partnership in the hands of the said R. Johnston, to manage in such manner as he might deem advisable, the deponent expecting that he would account for all such goods when the affairs of the said co-partnership could be wound up. That from the 31st of December, R. Johnston had the uncontrolled possession of such goods, and carried on the business on his own separate account.

The simple question was, whether the property, which had belonged to the part-

nership, and which remained in the possession of Johnston up to the time of the bankruptcy, should be considered joint property, or the separate property of Johnston, for the purpose of administration.

Mr. Swanston, for the petition.

Mr. Anderdon, contra, objected that the case came before the Court improperly, for that the commissioner ought to have decided and given his judgment one way or the other; or should have stated the facts out of which his doubt arose, and the grounds upon which he refused to give his judgment.

[*SIR JOHN CROSS*.—The commissioner has no jurisdiction to give a judgment binding upon the parties; he merely acts ministerially: and if he suspends his judgment, it may be better to do so, than to pay away the dividends. It is proper, that if the commissioner has a doubt upon the rights of the parties, he should pause for the opinion of this Court.]

Mr. Swanston, for the petition.—This case brings before the Court the question of what is, and what is not, separate property. The two bankrupts were in partnership up to December last, at which time the partnership was dissolved, but no assignment of the joint property to the continuing partner, nor any agreement to assign it, was made by the retiring partner. In this state of things then, Johnston continued to carry on the business upon his own account in the partnership name; and the assignees contend, that the property, which was joint, has become administrable as the separate property of Johnston. The dissolution having taken place without any conversion of the joint into separate property, the only effect of Johnston remaining in the possession of it was to make him a trustee, as to Danson's share, for Danson and the joint creditors. In *Ex parte Williams* (1), Lord Eldon said, "That where there is merely a dissolution without a conversion by assignment, or agreement to assign, then the continuing partner is to be looked upon as a trustee." This is precisely that case. His Lordship, in *Ex parte Williams*, declared the effects separate effects, but then he did it upon the ground that there was distinct evidence

of an agreement that the joint effects should be considered separate effects. No argument can be maintained upon the ground of order and disposition.

Mr. Anderdon, for the assignees.—The separate creditors do not allege that this property passed to Johnston by assignment; but the question is, what is to take this case out of the rule as to order and disposition. What difference is there between this case, and the case of *Ex parte Leaf* (2)? *Ex parte Williams* did not settle this point. Notice of the dissolution was given on the 31st of December, and after that, Johnston, with the permission of Danson, remained in the exclusive possession. A stronger case of reputed ownership could not be presented to the Court, and why is not the doctrine to apply?

[*SIR GEORGE ROSE*.—I never saw a clearer case of joint property. No doubt, when, upon a dissolution, the property is assigned, or agreed to be assigned to the continuing partner, there the assignment will convert the property: but, on the contrary, if the agreement be executory, it will not have that effect—*Ex parte Wheeler* (3). This is clearly an executory agreement. The accounts remain still to be taken. The property was in the possession of Johnston alone, but then it was clothed with a trust for the other partner.]

It is clear that there was no trust for the joint creditors; it was for Danson himself; therefore, he was the beneficial owner jointly with Johnston: consequently Johnston was in possession of this property, with the consent of the true owner, for a considerable time, during which, he might have pledged all this property. Supposing the compact did not change the nature of the property, yet if it is not demanded back before the bankruptcy, the property will be changed. Suppose Johnston had been a depositor of these goods, whereby he would have gained a credit, the principle as to the doctrine of reputed ownership must have been called in; and in what respect does this case differ from that?

SIR JOHN CROSS.—There is no question that in point of fact the effects which were

(1) 11 Ves. 3.

(2) 1 Dea. 176.

(3) Buck. 25.

joint property at the time of the dissolution, continued to be joint property as between the partners up to the time of the bankruptcy, for it is not pretended that the retiring partner assigned the effects to his continuing partner; on the contrary, it is admitted that there was no assignment, or agreement to assign. As between themselves, therefore, the continuing partner held the property in trust, first, for the payment of the joint creditors. In consequence of the bankruptcy, all these effects have come to the hands of the assignees, who do not contend that this property was the separate property of the continuing partner, but they say that they are entitled, by virtue of the 72nd section of the Bankrupt Act, to apply it to the payment of the separate creditors of the continuing partner, as being in his order and disposition at the time of the bankruptcy; but, I think, that section does not apply, as between partners. In *Ex parte Wheeler*, only one partner became bankrupt, therefore the assignees could not have taken the property without calling in aid the 72nd section, but the Lord Chancellor held that that section did not apply. But supposing that it was in the order and disposition of the continuing partner, another question would then arise: for supposing that the retiring partner had not been a bankrupt, the property must then be, not only in the order and disposition of the continuing partner, but he must be the reputed owner; for the statute says, "whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner." Now here, manifestly, he never was the reputed owner, because he continued the business in the name of the firm. Under all the circumstances, I think, that this property is joint property, and distributable as such, even if it had come within the operation of the 72nd section.

SIR GEORGE ROSE.—The question is, how is this property to be administered? It appears to me, that ever since *Ex parte Wheeler*, the question is, whether the agreement is executed or executory. I am therefore of opinion, that the property is to be administered as joint property.

Declaration as prayed.

1840. } *Ex parte* ANN BILLINTON,
Nov. 23, 24. } in re JOHN BILLINTON
THE YOUNGER, A BANKRUPT.

Solicitor's Bill of Costs—Retaxation—Imputed Negligence—Jurisdiction.

Upon the petition of the administratrix of an assignee to have two bills of costs taxed, having regard to acts of unskilfulness and negligence charged against the solicitor; one of the bills having been incurred in bankruptcy, and the other at law; and an order having been made by a Judge at law, referring the latter for taxation, but declining to refer the former, which had been taxed by the commissioner:—Held, per Sir John Cross, that the costs incurred in bankruptcy should be referred for taxation in the ordinary way, but that the costs at law were not within the jurisdiction of this Court for taxation.

Per Sir George Rose.—*This Court will not direct the taxing officer, in taxing a solicitor's bill of costs, to have regard to acts of imputed negligence, except, as in the case of Ex parte Southall, where the bill of costs constituted the petitioning creditor's debt.*

The petition stated, that a fiat issued against the bankrupt in the month of January 1834, on the petition of John Billinton the elder, who also became the assignee under that fiat; that Robinson, the solicitor to the fiat, commenced several actions at law in the year 1834, which proved altogether unsuccessful; that John Billinton the elder, during his lifetime, paid various sums of money to Robinson, amounting to 111*l.*, on account of business done as such solicitor; that Robinson had never, to the knowledge of the petitioner, delivered any bill of costs to Billinton the elder in his lifetime; that Billington the elder died in February 1835, and the petitioner took out letters of administration of his estate and effects; that in May 1840, Robinson, for the first time, delivered to the petitioner two signed bills of costs as such solicitor as aforesaid, one amounting to 94*l.* 8*s.* 9*d.* for his costs in bankruptcy, and the other amounting to 218*l.* 14*s.* 11*d.* for his costs in the actions, he not giving credit for any sums so paid to him by Billinton the elder; that Robinson

commenced his action to recover such costs in the month of June ; that shortly afterwards the petitioner sued out a summons in the said action to obtain a taxation of the said bills, which summons was postponed, at the instance of Robinson, until the 20th of August, when the matter came on before Bosanquet, J., Robinson in the meantime having made an affidavit, in which he stated, that the said first bill of costs, which had been taxed and allowed by the commissioners at the sum of 94*l.* 8*s.* 9*d.*, had been paid, by various sums received by him from Billinton the elder, in the year 1834.

The petition then stated, that Bosanquet, J., upon the hearing of the matter, declined to give any direction touching the first bill of costs, on the ground that the same had been so taxed as stated in the affidavit of Robinson, and he ordered that the bill of costs, amounting to 218*l.* 16*s.* 11*d.*, but not the bill taxed in bankruptcy, should be referred to the Master to be taxed, and that Robinson should give credit, at the time of taxation, for all sums of money by him received from or on account of the petitioner, or John Billinton, deceased, the petitioner having undertaken to pay what should appear due on the said taxation ; but that this order had not been drawn up or acted upon. It did not appear very clear upon what grounds Bosanquet, J. declined to refer the first bill for taxation. The petitioner charged unskillfulness and negligence against the solicitor in the conduct of the business, both in bankruptcy and at law, and submitted, that she was entitled to have the said two bills referred together to the registrar to be taxed ; and to be taxed upon the principle that no charges should be sustained which were incurred by his unskillfulness or negligence.

Affidavits were filed in opposition, which refuted all allegations with respect to unskillfulness or negligence.

Mr. Anderdon, for the petitioner.—This is the same question which was discussed in *Ex parte Southall re Southall* (1), which was the case of the bankrupt petitioning to supersede, upon the ground that the petitioning creditor's debt, which was his

bill of costs as a solicitor, would not be found sufficient to support the fiat if duly taxed by the registrar, he disallowing all costs and expenses incurred through the negligence of the solicitor : the Court there referred the bill of costs to the registrar to be taxed, *having regard to the charges of negligence*. The Court is now asked to engraft this special direction into the order of taxation.

[*SIR GEORGE ROSE*.—It appears to me that you must discharge Mr. Justice Bosanquet's order before you can come here.]

That will not be necessary, as it has not been drawn up or acted on. It is quite a matter of course for a party who desires it, to have the commissioner's taxation reviewed. As to the bill of costs of the petition it was not within the jurisdiction of the court of law to order that to be taxed. Mr. Justice Bosanquet's order must be confined to the costs in the actions ; but the whole of the costs are contained in Robinson's account. If no order had been made, this Court could have had no hesitation in referring both bills together, to be taxed by its registrar, and with the same direction as was made in *Ex parte Southall* ; but, in fact, there is no subsisting order under which the party can act, it not having been drawn up ; therefore the matter stands as if there had been no order made, which can be an impediment to this Court ordering the taxation of the whole bill.

[*SIR JOHN CROSS*.—The 14th section of 6 Geo. 4. c. 16. says, "That so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the court in which such business shall have been transacted ;" how then can we tax this bill, which is not within our jurisdiction ? The registrar might indeed send such to the officer of the court of law to be taxed.]

If there are any items of the account which were incurred in bankruptcy, it brings the whole within the jurisdiction of this Court.

Mr. Swanston, contra. — The whole question was decided by Bosanquet, J. against the petitioner. She now raises two questions ; first, whether the bill of costs for 94*l.* 8*s.* 9*d.* is subject to retaxation ; and

(1) 1 Mont. & Ch. 346, 656 ; s. c. 4 Dea. 91, 99.

secondly, whether the bill of costs for £187. 16s. 11d. is to be taxed under the common order, or with a special direction engrafted into it. No objection is made to the latter being taxed in the ordinary way, but an inquiry is asked as to unskilfulness and negligence, all of which is distinctly refuted by the affidavit of Robinson. As to the petitioning creditor's bill, that ought not to be taxed again. In the first place, it has been paid by appropriation with the sums paid by the petitioning creditor Billinton the elder, and for which credit is given. Is there any distinction between a payment of a sum expressly for a particular debt, and the appropriation of certain payments, which should have been applied in discharge of that precise debt? Secondly, Bosanquet, J. refused to order this bill to be taxed, upon the ground that it was taxed and paid six years before.

[SIR JOHN CROSS.—The commissioner's taxation is binding upon a court of law, though not upon us; for the statute says, that if the party is aggrieved he can come here.]

Had the petitioner come here, this Court would have made the same order as Mr. Justice Bosanquet has made—*Ex parte Christy* (2).

[SIR GEORGE ROSE.—It was quite competent for the administratrix to have come for the taxation of the entire bill; but having gone before a common law Judge, and obtained an order, how are we to deal with that order while it stands?]

It is a question of law, whether the first bill is, or is not, paid. The rule of law, as to appropriation, proves that it has been paid, just as much as if it had been specifically paid.

Mr. Anderdon, in reply.—Had it not been for the proceedings in the court of law, the petitioner would have been quite right in praying for the taxation of the whole bill; the order then for the taxation of the costs at law, cannot prejudice the petitioner's right to have the petitioning creditor's bill taxed, which was refused, not because it had been paid, but simply because it was out of the jurisdiction of the Court. Therefore, upon the authority of *Ex parte Southall*, the petitioner is enti-

pled to an inquiry, as to whether there was negligence: indeed, this is a much stronger case. The whole bill ought to be retaxed together, which cannot prejudice the solicitor more than by having one part of the bill taxed by the officer of this court, and the other part by the court of common law.

SIR JOHN CROSS.—There is a complete answer made to this petition, so far as respects the imputed negligence. The petition prays, that this Court will direct the taxation of the costs incurred at law, and also of the petitioning creditor's bill. As to the costs at law, I think they are in the proper course of taxation; and if there had been no such order as has been made in this case by Mr. Justice Bosanquet, we must have sent them to that very jurisdiction. Therefore, it appears to me that there is no ground for this Court to refer the costs at law to be taxed by our officer. Nothing remains but the question of the petitioning creditor's debt. The petitioner was neither petitioning creditor nor assignee, nor is she supposed to have been cognizant of the bankruptcy, or that there was any claim against her until the delivery of the bills of costs by the solicitor. It appears remarkable, that the solicitor should not for six years have asked for payment of these bills. There is no evidence that the administratrix knew anything of the petitioning creditor's bill until the 5th of May, when the copy of the bill was served upon her; she therefore could not have applied for taxation before. It appears to me, that the learned Judge declined to tax that bill, because it was not within the jurisdiction of his court. The sole question is, whether an administratrix, who, for the first time, has heard of the claim that is against her, should have the petitioning creditor's bill taxed. It is contended, that this bill has been paid for six years; if so, was it just or right for the solicitor, upon the 5th of May, to serve a copy of that bill, and demand payment of it? When he was called on for his particulars, he stated that bill as an outstanding demand; afterwards he stated, that he received 111*l.* from the deceased assignee, and that he had appropriated that to the payment of the petitioning creditor's debt; if so, ought he to have served that bill upon the petitioner?

(2) 3 Mont. & Ayr. 84; s. c. 6 Law J. Rep. (n.s.) Bankr. 88.

It appears, therefore, that the solicitor has throughout treated that as an open bill; and that he never thought of a special appropriation until he found it would serve his purpose here, with reference to the lapse of six years; and he protects himself by saying it ought to have been taxed years ago. I think, therefore, that the petitioner is entitled to have this bill taxed; the rest of the petition to be dismissed, with costs.

SIR GEORGE ROSE thought that the petitioning creditor's bill could not be ordered to be retaxed; and as to the other bill, his Honour said, "But if the other part were open and free from the embarrassment of the order, the only question would be, was the business done, yes or no?" We could not give the direction which the petitioner asks, with respect to the imputed negligence, &c. *Ex parte Southall* is not an authority for this direction which is asked. In that case the petitioning creditor was a solicitor, and his debt was a bill of costs; and it is only an authority for such special direction, where the bill of costs sought to be taxed constitutes the petitioning creditor's debt.

Ordered, that the petitioning creditor's bill be referred to the registrar to be taxed in the ordinary way; the rest of the petition dismissed, with costs; the payment of such costs to be reserved.

1841.
Jan. 26, 29. { *Ex parte* WILLIAM BAINE re
EDWARD BODEN, A BANK-
RUPT.

Equitable Mortgage—Heir.

Equitable mortgage by heir, good against simple contract creditors of intestate.

The petitioner was the public officer of the Commercial Bank of England, with which bank the bankrupt kept an account at Manchester in and prior to June 1839. On the 5th of that month, the bankrupt being desirous of obtaining a larger advance of money from the bank than the bank was inclined to give without security, he deposited with the bank the title-deeds of certain premises, to two-thirds of which he was entitled, to secure their advances to him.

On the 10th of April 1840, a fiat issued against the bankrupt, at which time he was indebted to the bank in the sum of 388*l*. The petition prayed, that the bank might be declared equitable mortgagees of the two-thirds of the premises; that the property might be sold, and the proceeds applied in payment of their debt, and, if not sufficient, then for leave to prove for the difference. At the date of the deposit, the property was vested in the bankrupt in the following manner:—As to one-third he was absolutely entitled under his father's will, which will gave him one-third, his brother O. L. Boden, another third, and his sister the remaining third, as tenants in common. O. L. Boden, the bankrupt's brother, died intestate in the month of January 1838, leaving the bankrupt his heir-at-law, and as such he became entitled to the second and third. The bankrupt took out letters of administration to his brother, in the month of April 1838, and got in all the personal estate of the intestate, and applied it and 108*l*. of his own money in payment of his debts, his brother's personal estate ultimately proving deficient by the amount of 331*l*. 9*s*. 6*d*. The bankrupt being so circumstanced, and supposing that he was fully able to pay, not only his own debts, but also his brother's, deposited the title-deeds with the bank as before stated.

The question was, whether the simple contract creditors of O. L. Boden, deceased, and the assignees of the bankrupt, in respect of the 108*l*. 6*s*. 2*d*. so paid out of the bankrupt's estate, were entitled to the proceeds of his one-third, or whether the bank were entitled by virtue of their equitable lien.

Mr. Swanston, for the petitioner.—The bank has clearly a lien upon these two thirds, and it would be equally clear, that had the brother's creditors a lien also, their lien being prior would defeat the lien of the bank; but the creditors have no lien here.

Mr. Anderdon, for the assignees.—The creditors of the dead brother are entitled to be paid their debts out of the proceeds of his one-third, and the assignees are entitled in the first instance to be refunded out of the proceeds, the sum of 108*l*. 6*s*. 2*d*., which the bankrupt paid to his brother's

creditors out of his own monies. The effect of Sir Samuel Romilly's Act was, to create a charge upon real property for simple contract creditors, and that the personal estate proving insufficient, the real estate should be administered in a due course of administration. Specialty creditors are given the preference, but then, simple contract creditors are placed in the same position as specialty creditors were placed in before the act. It cannot be doubted that, whoever takes even an absolute conveyance from an heir is bound to inquire whether the debts of the intestate are paid or not. Then the simple question here is, shall an equitable mortgagee be in a better position than an actual purchaser for valuable consideration—*Ex parte Big-nold* (1).

Mr. Younge appeared for the creditors of the bankrupt's deceased brother, but had not been served with the petition.

Mr. Swanston, in reply.—The only question is, as to the simple contract creditors of the brother. Unless they have some lien upon the estate, they can have no title against the equitable lien of the bank. The question is precisely the same now between the simple contract creditors, as before the statute it would have been with the specialty creditors: but they had no lien; then how can the simple contract creditors be said to have a lien upon this property? A debt is only chargeable upon the land in the hands of the heir or devisee; but when the heir or devisee parts with the property, it does not continue to be chargeable in the hands of a purchaser.

Jan. 29.—*SIR J. CROSS*.—The only doubt I had in this case was, whether what *Mr. Swanston* stated to be the law, was so, namely, that though a simple contract debt is chargeable on the land in the hands of the heir, yet that it was not chargeable upon the land in the hands of a purchaser from the heir or devisee. I was not prepared to go this length when the case was argued, but now I have no doubt upon the subject. I find that in the case of *Forrester v. Lord Leigh* (2), *Lord Hardwicke* said, "There is a difference as to the bond debt. A mere

specialty debt is no lien on land in the hands of the obligor, his heir or devisee. A mortgage is a lien, and an estate in the land. By devise of land mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee; if for years, the reversion and equity of redemption passes." And by the act of William and Mary, it was provided, that a creditor might maintain an action against the heir and devisee jointly. And if the heir alien the estate, he shall be liable to the value of the lands sold, and also the devisee shall be liable, though he alien the land before the action brought; clearly shewing that the creditors can only charge the devisee in respect of the land. It appears to me, that the petitioner's charge is as well upon the brother's one-third as upon the bankrupt's own, and that therefore the bank is entitled to both the thirds, notwithstanding any claim made by the creditors of the deceased brother, who may, in the event of the property more than satisfying the debt due to the bank, be entitled to be paid thereout.

Ordered as prayed.

1841. } *Ex parte BUDD re*
Jan. 12, 14, 16, 20. } BUDD.

Act of Bankruptcy—1 & 2 Vict. c. 110.
s. 8—*Affidavit of Debt*.

Where from various arrangements to which a creditor is privy, the twenty-one days allowed for securing a debt under 1 & 2 Vict. c. 110. s. 8, has been allowed to expire, he will not be allowed to found an act of bankruptcy upon such default, especially where the Court believes that the affidavit of debt was originally filed for other purposes than that of proceeding to bankruptcy.

This was the petition of the bankrupt, a commission agent for the sale of metals, at Liverpool, who had formed a partnership with a *Mr. Cooper Ewbank*, the terms of which had been negotiated by his uncle, *Mr. Henry Ewbank*, who appeared to have supplied the capital of 2,000*l.* for his nephew. About the end of the year 1836, the partnership extended their business to the manufacturing of zinc, and took pre-

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(1) 1 Dea. 515; s. c. 6 Law J. Rep. (N.S.) Bankr. 16.

(2) Amb. 174.

NEW SERIES, X.—BANKR.

mises at Acton for carrying on the manufacture, which, during the absence of the petitioner, H. and G. Ewbank purchased for the sum of 1,200*l.*, and paid the vendor 1,200*l.*, which they borrowed from Dr. Christopher Cooper, another uncle of Cooper Ewbank, his partner. The petitioner at first objected to the purchase, but ultimately confirmed it, and the partners gave their joint bond to Dr. C. Cooper. The firm of Budd & Ewbank occasionally required a larger capital than the one advanced, and occasionally drew upon the firm of Ewbank & Cordes. It appeared that several negotiations were entered into between H. Ewbank and the petitioner, which ended in Cooper Ewbank being admitted into a half share of the profits of the partnership, H. Ewbank, the uncle, advancing 4,000*l.* to make up his nephew's share of the capital. In 1840, various disputes arose between H. and C. Ewbank and the petitioner, and it was agreed that a dissolution of partnership should take place, but the terms were not agreed upon; and the petition alleged that H. Ewbank, for the purpose of enabling him to command a dissolution of partnership, made a demand for a sum of 5,000*l.* advanced, without considering the 4,000*l.* advanced to Cooper Ewbank, his nephew, as a separate debt of his. This the petitioner resisted, but, under a threat of bankruptcy, was induced to sign an undertaking, not to make any payments except those stipulated, and for the necessary expenses of the business. Several letters were sent by Henry Ewbank, urging a dissolution of the partnership, and threatening to make the petitioner a bankrupt, in case of non-compliance, and the affidavit of debt was filed and served upon the petitioner, and on the same day Henry Ewbank renewed his proposals for a dissolution; and an agreement was entered into between the parties, which went off, and the fiat was issued the 11th of September. The affidavits were very long, and are referred to in the judgment of Sir J. Cross. The petition prayed a supersedeas and assignment of the bond.

Mr. Swanston and *Mr. Rolt*, for the petitioner. — There is no act of bankruptcy to support this fiat. Both debtor

and creditor entered into an agreement for the satisfaction of this debt. Both parties gave instructions to the solicitor to prepare the deed. Then an agreement having been once entered into, and being terminated, the matter cannot be left as if there had been no agreement. After the expiration of the twenty-one days, the creditors treated the agreement as one still to be carried out by the deed. This agreement, therefore, must be looked upon as a satisfaction of the debt. For it is not necessary that in every case there should be a legal security for the debt. An agreement to give a security may be a security to the satisfaction of the debtor. But supposing the debt not to have been secured as the statute requires, still the creditor, who has acquiesced in the arrangement, and been privy to the delay, cannot take advantage of it, as an act of bankruptcy. In *Ex parte Brown* (1), this Court was of opinion that the party could not take advantage of the statute, he having acquiesced in an arrangement. That case is, in every essential point, identical with this. See also *Attwood v. Banks* (2), for the remarks of the Master of the Rolls. It is perfectly clear that this affidavit was filed for no other purpose than compelling the petitioner to dissolve partnership, and relinquish the zinc trade to the petitioning creditor's nephew.

Mr. Bethell and *Mr. Anderdon*, for the respondents. — Three points arise in this case. First, is there an act of bankruptcy? Secondly, has the petitioning creditor done anything to prevent him taking advantage of the statute? Thirdly, was the fiat sued out for any other than a proper object? Now, as to the first point, the 8th section of 1 & 2 Vict. c. 110. directs that the debtor shall give security for his debt to the satisfaction of the creditor; and that if he fail to do so within the twenty-one days, that will be an act of bankruptcy. Can it be said then that this debt was satisfied, or that security was given, within the meaning of the statute? as it is perfectly clear that it was not until the 14th of August that James Ewbank knew anything of the mat-

(1) 1 Mont. & Ch. 177.

(2) 2 Beav. 192; s. c. 9 Law J. Rep. (N.S.) Chanc. 99.

ter. If the Court think there was a valid agreement, it is conceded there will be no act of bankruptcy. But an agreement must be mutual. Now, would Mr. Budd, at the expiration of the twenty-one days, have been in such a situation as to have been able to have filed a bill in equity on the 18th of August, to have compelled Mr. Ewbank to have signed the deed? The contract on the part of Mr. Budd was, that he was to obtain his brother's consent. He must have alleged that his brother had assented to the deed; also, that the other party had assented: and this allegation he could not have made, for the agreement on the part of the brother was not completed until after the twenty-first day. What would have been the answer? 'You have let all the time pass, and you have not obtained the consent which you have undertaken to do, and which we could never have any other means of ascertaining than from the bankrupt, whether the terms had been complied with.' Can it be said that, this was such an agreement as secured the debt according to the meaning of the statute? This state of things will shew the Court how very necessary it is to draw the distinction between the meaning of treaty negotiation and agreement; for if every negotiation is to be considered an agreement, it will defeat entirely the intention of the legislature, on the score of humanity, of allowing the debtor and creditor time for coming to an arrangement within the twenty-one days; for if these things were held to be an agreement, who would even venture to hold any intercourse with a debtor against whom he had filed an affidavit?

[SIR J. CROSS.—Put it this way, 'I expect a cargo to arrive in the course of a few weeks; I will assign you my interest in that,' will not that be satisfaction, although not executed?]

Yes, that would be, but here there is no such agreement. In the case of *Ex parte Brown*, there was a withdrawal of the demand; but here there is no withdrawal of the demand during any period of the time. Suppose a creditor files his affidavit, and meets his debtor, who says, 'I will give you a mortgage on my property worth 10,000*l*.' and the creditor agrees to accept it, but

does not get the mortgage, surely the agreement is not a security. Suppose, if instead of offering a mortgage upon his own estate, he offered one upon the estate of A B, what situation would the creditor be in at the end of twenty-one days? The legal remedy by fiat is lost, and he is driven to a suit in equity. In this case, the bankrupt pretended to be authorized to act for parties for whom he was not authorized, and it was not until after the expiration of the time, that it was ascertained he was not authorized by the parties. Mr. Watson's letter demands the completion of the deed, &c. within the twenty-one days, and what is his admission after the time is expired, "Your notice, which you have refused to withdraw, has deprived me of the opportunity of raising the money." Here is an acknowledgment of refusing to withdraw the notice. It may be confidently anticipated, that the Court will hold that there was nothing during the twenty-one days, which rendered Mr. Ewbank in equity disqualified to prosecute his fiat. There are two letters of the 6th and 7th of September, where he expresses in the most frank manner that an act of bankruptcy had been committed, and where no shadow of complaint is made. But there is another circumstance, which evidently shews fraud on the part of the bankrupt, and which opened Mr. Ewbank's eyes, and made him suspicious. By the deed, the mill and all the fixtures were to have been assigned to Ewbank, but Budd had wished to keep the rollers, which were stated to be worth only about 150*l*., whereas, afterwards, Mr. Budd proposed to assign these pillars and rollers for 500*l*. Here was certainly a misrepresentation as respected the value of the machinery. It is therefore contended, that the petitioning creditor has only done that which he had a perfect right to do, issued a fiat against a firm which was notoriously insolvent; and no possible good can arise from a supersedeas of this fiat.

Jan. 20.—SIR J. CROSS.—In this case an affidavit of a debt of 5,500*l*. has been filed, and a demand made of immediate payment, pursuant to the late act for abolishing arrest; and the petitioner has been declared

bankrupt, for not paying the debt within twenty-one days, as the act requires. On the part of the petitioner it is contended, first, that the debt in question was greatly overcharged; secondly, that the debt was secured to the satisfaction of the creditor, as the act directs, within twenty-one days; thirdly, that the creditor consented to postpone the payment beyond the twenty-one days; fourthly, that the fiat was sued out for other purposes than those by law intended. I find the first two of these objections involved in a mass of conflicting testimony, and I shall therefore confine my observations to the two latter, about which there is no contradictory evidence: all the facts relating to them being distinctly admitted on both sides, they lie in a narrow compass. I have therefore only to consider, whether the payment was postponed with the consent of the creditor, and whether the fiat was sued out for purposes for which the law does not intend it. The debt in question was a joint debt, owing by the petitioner Budd and his partner Cooper Ewbank to Henry Ewbank and his partner Cordes; and the same notice and demand was served upon both joint debtors, on the 28th of July, and the twenty-one days expired on the 18th of August. As soon as their demand of prompt payment was made, the parties proceeded to negotiate for a compromise of the debt, and for other purposes; and it appears, that about the same time, and in furtherance of such negotiation, the respondents Henry Ewbank and John Budd delivered their mutual proposals, in writing, to Mr. Watson the solicitor, with instructions from Henry Ewbank to prepare a deed in conformity thereto; and the latter, in his affidavit, states, "that in pursuance of these arrangements the draft of a deed was prepared by Mr. Watson, as the solicitor for Ewbank and Cordes, and also for his nephew Cooper Ewbank, and by Mr. Bevan, as solicitor for John Budd." The nephew took no part in the arrangements, but left everything to his uncle, who had originally placed him in the partnership, and lent money thereto for carrying it on, and the avowed object of his uncle then was, not to enforce the prompt payment of the debt, which would have entirely

defeated his intent, but to withdraw his nephew from the partnership, to liberate him from the partnership debts, and to enable him to continue alone in the zinc trade, then carried on in partnership with John Budd. After having so given Mr. Watson full authority to conclude the negotiation in due form of law, Henry Ewbank left Liverpool and returned to London, and Mr. Watson says, that about the end of July, or early in August, he accordingly prepared the draft of a deed, the terms of which were finally settled between him and Mr. Bevan; and that on the 18th of August he, Watson, caused the deed to be engrossed. So that it is clear that the terms on which the debt in question was to be satisfied, were completely agreed upon nearly a whole week before the expiration of the twenty-one days, and nothing then remained but the formal execution of the deed by the several parties thereto, being seven in number. That deed provides for the conveyance of the mill, machinery, utensils, and dwelling-house and premises at Acton, where the zinc trade was carried on, to Henry Ewbank, "in full satisfaction" of the debt in question. And the deed further provides for the dissolution of the partnership, and for giving the nephew the exclusive right of possession of those premises from the 3rd of August, and certain creditors of the partnership thereby agree to release the nephew, and to accept in his place the brother of John Budd, as a guarantee for the payment of their debts, and the brother covenants for the payment of them. When the deed was engrossed, the parties being so numerous, and dispersed in various places, it was not found practicable to obtain their signatures within the few days that remained of the twenty-one: nevertheless it was shortly afterwards duly executed by John Budd and his brother, and the several creditors parties thereto; and then Watson, on the 27th of August, transmitted the deed to Henry Ewbank for his signature, but he, however, instead of executing it, sent, on the next day, a letter to Mr. Watson, saying, "I received yours, with the deed, but before I sign it, I must have my requisition complied with;" and he then goes on to insist on the previous

delivery of various articles conveyed to him by the deed, and further insisting, that "the zinc trade should be entirely relinquished to his nephew." The meaning of which last expression he more fully explains by his affidavit in these terms:— "It formed a very material consideration in the view of this deponent, *in acceding to an arrangement whereby he gave up a very large debt*, that he should thereby secure to Cooper, his nephew, the exclusive benefit of the zinc trade free from the future competition of John Budd." So that far from then repudiating the deed as executed after an act of bankruptcy, and therefore void, he signifies an intention to sign it, and he insists upon the entire performance of its stipulations, and also upon a new concession in restraint of the future trading of the petitioner, not included in the deed, nor in the written proposals handed to Mr. Watson before the deed was drawn. Afterwards various discussions took place between the parties, which do not appear to me at all material to the questions under consideration; and on the 11th of September, the fiat against the petitioner alone was sued out by Henry Ewbank, who seems to have thought that it was entirely in his option whether or not the petitioner and his partner, or either of them, was to be deemed bankrupt on the twenty-second day, according to the statute, and also whether the fiat should be prosecuted at all; and the petitioner himself seems to have thought so too, until he was better advised, inasmuch that several days after the fiat was issued, the solicitor for Henry Ewbank, as it is alleged in the petition, and not denied, called upon John Budd to make another, and what he called a final proposition, and produced a letter from the petitioning creditor, to the effect that the proposal the solicitor was then instructed to make, was the only alternative to keep the petitioner from the Gazette, and that was, that his brother should pay Henry Ewbank 400*l.*, and that the petitioner should undertake not to enter into the zinc trade again, and should submit to other terms therein mentioned, which he refused, but without questioning the right of the petitioning creditor to carry his menace into execution. Under these circumstances, it appears to me that

the affidavit of debt was filed, and the demand of immediate payment made, without any intent of enforcing it, for that would have been equally injurious to both the parties; but it was done for the purpose of effecting a dissolution of the partnership, upon terms more advantageous to the one than to the other, and which was, indeed, the effect of the subsequent negotiations. Be that, however, as it may, I find that as a party to the treaty, the petitioning creditor was privy and consenting to the suspension of the payment beyond twenty-one days, which he has since set up as an act of bankruptcy, an act of which, I think, he has no right to complain, and of which he cannot legally avail himself; and I consider that, for this reason alone, the fiat cannot be supported. And I moreover find, from the facts I have mentioned, and other undisputed facts before me, that this fiat was ultimately sued out by the petitioning creditor, in order to evade the execution of the deed, to effect an unconditional dissolution of the partnership, and to disable the petitioner from carrying on the zinc trade in future, in competition with his partner, which he could never do as long as the petitioning creditor should think fit to withhold his certificate. Besides, I think this course of proceeding was unjust, and contrary to good faith towards all the other parties who have executed the deed, and has involved their rights and interests in great uncertainty and confusion while the fiat remains in force. If the petitioner was to be deemed a bankrupt for not paying the debt within twenty-one days, so also was his partner; and I conceive it was the duty of the petitioning creditor, in that case, to sue out a joint fiat, and not a separate one, which by law entitles him alone to take any benefit from the separate estate of the petitioner, to the exclusion of the other joint creditor, until his own debt is paid in full. I consider therefore that the petitioner has clearly established two at least of his objections to the fiat, and that it is my duty to declare that it must be superseded, with costs against the petitioning creditor, as prayed by this petition.

1841. { *Ex parte* A. M. LINDEN AND AN-
 Jan. 13. } OTHER *in re* ROBERT BAKER
 AND JOHN HARLEY, BANK-
 RUPTS.

Equitable Mortgage.

*A testator devised certain building land to trustees for sale, and declared "that they might make such agreements with the purchasers thereof, as to the forbearance of payment of the purchase-money, and to advance such sums for the purpose of assisting the purchasers, in building or otherwise, in the manner he had been accustomed to do." The testator was in the habit of allowing the purchase-money to remain secured upon the land; and also subsequent advances made by him to assist the purchasers in building; and had dealt with the bankrupts upon this system. After the testator's death, the bankrupts purchase a piece of land from the trustees, leaving the purchase-money secured upon the premises; subsequently the trustees advanced 600*l.* to them for building, but took no security for it:—Held, upon the bankruptcy of the purchasers, that the trustees were equitable mortgagees, as well for the advances as for the purchase-money.*

This was the petition of Anna Maria Linden and Thomas Rickson Burden, the executrix and executor of one James Linden; and it stated, that in and previously to the year 1827, the said James Linden being seised of a certain piece of freehold land, and being in the habit of selling (to builders) portions of it, in plots, for building, and of advancing money to the purchasers, to enable them to build houses thereon, such advances being lent upon the security of the land, and the erections to be made thereon, entered into an agreement in writing with the said bankrupts, to sell and convey a portion of the building land to them, for the sum of 160*l.*; and it was agreed between the parties, that the bankrupts should pay 8*l.* in advance yearly, until the completion of the purchase, being at the rate of 5*l.* per cent. on the purchase-money;—that the vendor subsequently, and in accordance with his usual practice, made certain pecuniary advances to the bankrupts, to enable them to build on the piece of land, such advances being made upon the security of the land and the

buildings thereon; and on the 27th of November 1828, the said Robert Baker, on behalf of himself and Harley, signed the following memorandum:—

"James Linden has rendered us an account, which we acknowledge to be just and right, amounting to 606*l.* 7*s.*, and that the same is a charge upon the land, agreed to be bought by us, and the buildings we have erected thereon; the interest to be paid quarterly, or carried forward as principal money as heretofore."

That on the 1st of March 1829, the said James Linden entered into a similar agreement with the bankrupts, for the sale of three other lots of the said building land, for the sum of 320*l.*;—that the said James Linden, by his will, dated the 17th of February 1829, "gave, devised, and bequeathed all his real and personal estate to the petitioners, their heirs, executors, administrators, and assigns," upon trust for sale, at such times as they should think proper; "and he declared, that his said trustees and the survivor of them, &c. should have full power to make such agreements with the purchasers thereof, as to the forbearance of payment of the purchase-money, and to advance out of the monies belonging to his estate, such sums for the purpose of assisting the purchasers of the said land in building or otherwise in the manner he had been accustomed to do, as to them the said trustees or trustee for the time being might seem expedient;"—that the testator departed this life in the month of April 1839;—that on the 25th of December 1839, the petitioners, in pursuance of the trusts of the will, entered into a written agreement with the bankrupts, for the sale to them of another portion of the testator's said building land, for the sum of 75*l.*, the bankrupt agreeing to pay interest at 5*l.* per cent., until the purchase should be completed;—that the petitioners as such trustees, and under the authority of the said testator's will, advanced to the said bankrupts sums amounting to 600*l.*, to enable them to build on the land so sold by them, upon the mutual understanding that the said advances were to be a charge upon the said land so purchased as agreed, and on the houses and premises so to be erected and built thereon;—that a fiat had issued against the bank-

rupts, under which they were duly declared bankrupt. The petitioners then prayed that they might be declared equitable mortgagees of the said parcels of land so contracted to be sold, and the buildings erected thereon, not only in respect of the said purchase-moneys, but also in respect of the advances and interest thereon.

In a letter written by the bankrupt Baker, subsequently to his bankruptcy, he acknowledged that all the advances made by the petitioners as such trustees, were for the purpose of enabling the bankrupts to go on with the buildings, and were made upon the understanding that the bankrupts had no right to ask for a conveyance of the land until the sums lent, as well as the price agreed to be paid for the land, was paid.

Mr. Swanston and Mr. Wilbraham, for the petitioners.—The bankrupts having purchased this land, (under the power in the will,) must have purchased it cognizant of the trusts therein contained; and they must be presumed to have borrowed the money which was subsequently advanced to them by the petitioners, upon the only terms that they, the trustees of the will, could advance it, namely, in the same manner in which the testator was in the habit of doing, upon the security of the premises. It cannot be presumed that the parties intended to depart from the mode in which the testator dealt with the petitioners. It is not necessary that there should be any writing, for the purpose of creating a security—*Ex parte Langston* (1), and slight evidence will be sufficient to extend a security to cover subsequent advances—*Ex parte Kensington* (2). It is submitted, therefore, that there is evidence enough to shew that the advances were made upon the security of the premises, in accordance with the regular system that the testator in his lifetime followed; and that the petitioners are equitable mortgagees, in respect of the advances, as well as for the purchase-money.

Mr. Bacon, for the respondents.—There was no agreement entered into either by the testator, or his executors and trustees, by which monies to be subsequently

advanced to the purchasers, were charged upon the premises purchased. No doubt the vendor retains a lien upon the premises for the purchase-money, or so much as remains unpaid, but the lien cannot be extended to cover other sums not part of the purchase-money. *Ex parte Langston* was not the case of a vendor's lien, but of a previous equitable mortgage by deposit, which, it was held, would upon slight evidence cover subsequent advances; but the presumption is essentially different in the two cases of a vendor's lien, and of an equitable mortgage. It may be easily presumed, that a security so unlimited as a deposit of title-deeds, was intended as a security for all advances, whether prior or subsequent to the deposit; but there is no presumption that, because a vendor lends money to a purchaser, it is lent on the security of the premises, there being no evidence of an agreement to that effect. Even in the case of an actual mortgage, an express agreement is necessary to extend it to subsequent advances—*Ex parte Hooper* (3). According to the statement in the petition, a mere understanding is expressed to have been entertained as to the lien for the subsequent advances. But in the case of *Ex parte Kensington*, Lord Eldon, speaking of an equitable mortgage, stated, that an understanding alone, unless in a fair sense amounting to an agreement, would not do. This objection is stronger in the present case, from the circumstance that the testator did not consider a mere understanding sufficient, but he took a memorandum signed by the bankrupts, expressly creating a lien for the subsequent advances. The petitioners, therefore, are not entitled to extend their security for the purchase-money, to cover the advances made by them.

Mr. Swanston was not called on to reply.

SIR J. CROSS.—I cannot feel any doubt upon this case, notwithstanding the confidence with which *Mr. Bacon* argued it. I think he has mistaken the purpose of the memorandum taken by the testator; it was not, as he supposed, a memorandum to give a charge for money lent

(1) 17 Ves. 227.

(2) 2 Ves. & Bea. 79.

(3) 1 Mer. 7.

and laid out upon the premises; but the purchaser gave a charge upon the estate for the balance of account of monies then due. Then the question will simply be, if a man agree to sell his estate, and both parties agree that the vendor shall lay out a sum of money upon the improvement of it, will not that sum be equally a charge upon the estate as the purchase-money? Would any court of equity compel a conveyance of that estate without obliging the purchaser to pay the sum laid out in improvement, as well as the purchase-money? I am, therefore, of opinion, that the petitioners are entitled to what they claim by this petition.

1841. { *Ex parte* ELEANOR FORSTER
Jan. 12, 14. { *re* JOSEPH, JOHN, AND
WILLIAM FORSTER, BANKRUPTS.

Legacy, Payment of—Legacy payable on Marriage, ordered to be paid on the Bankruptcy of Party liable.

A testator, after giving 2,000l. to his daughter, directed that she should let her said legacy remain, continue, and be in the hands of his executors (his three sons,) until she should marry, and he charged the payment of it upon his real estate, which he devised to his three sons; all the three sons died, having devised their property to the bankrupts:—Held, that the legacy was payable now out of the real estate, though the legatee was never married.

John Forster, the elder, being in partnership with his three sons, Thomas, James, and John, as cotton-manufacturers, at Carlisle, and being seised in fee simple of divers real estates, by his will, dated the 3rd of September 1790, after directing that his debts should be paid, gave and bequeathed unto his daughter Ann the sum of 2,000l.; and he also gave and bequeathed unto his daughter Eleanor (the petitioner,) the sum of 2,000l., for securing which two said legacies, and the interest thereof, till the same should be paid by his executors, the said testator charged the same upon his real estates. And the testator thereby declared it to be his will and

mind, and he thereby ordered and directed that his said two daughters "should let their said several legacies remain, continue, and be in the hands of his executors, at interest at the rate of 4l. per cent. per annum, till they, his said daughters, should happen to marry; and that then and in such case, and upon such marriage or marriages taking place, the legacy or legacies be paid upon such her or their marriage or marriages, to her or them by instalments, at the rate of 666l. 13s. 4d. by the year, by his said executors, they, his said executors, contributing to the payment of such legacies equally, share and share alike."

The testator then gave and devised all his real estates to his three sons, subject nevertheless, and charged and chargeable for securing the said two legacies. And after other bequests the testator gave all the rest and residue of his personal estate to his said three sons, and appointed them his executors. The testator died on the 12th of February 1795, and the two legacies of 2,000l. remained in the hands of the executors, according to the directions in his will. All the three sons of the testator have since died, and under their respective wills the bankrupts became entitled to all the property comprised in the original testator's will, subject to the two legacies of 2,000l., which had not been paid off. Ann has since departed this life, never having been married. And on the 23rd of November 1836, a fiat issued against the bankrupts, under which they were duly declared bankrupt. The present petition was presented by the testator's daughter Eleanor Forster, who was still unmarried, for the purpose of obtaining payment of the legacy of 2,000l., and of having the same raised and paid out of the real estates, comprised in the will of the testator. And it prayed a declaration, that upon the true construction of the will of the said testator, the petitioner became entitled from the death of the testator, and now is entitled, to an absolute and unqualified vested interest in his said legacy of 2,000l., notwithstanding that the petitioner was then and still is unmarried; and that the same should be paid out of the proceeds of the real estate of the testator.

Mr. Swanston and Mr. T. S. Clarke, for the petitioner.—It is clear from the ex-

pressions used in the will, "let the said legacies remain in the hands of his executors," that the testator intended this legacy to be a vested interest in the petitioner, the payment only to be postponed: he first made an immediate gift of the legacy, but then he thought that his sons might as well have the use of it, they paying interest for it at a specified rate, the principal to be paid at the appointed time; but though that appointed time has not arrived, still, as all the brothers are dead, it is impossible for the petitioners to allow her legacy to remain in their hands. The only question which the other side can raise with any reason is, whether the petitioner is entitled to anything more than a present investment of a sum equal to the legacy, accompanied by a declaration that she will be entitled to the principal at the proper time. But, it is submitted, that the payment was only postponed for the purpose of giving the sons of the testator the use of the money; and they being dead, the legacy is not to be delayed any longer. It is not necessary to cite cases to shew, that where a legacy is given absolutely, but the payment only is postponed, the legacy will be payable to the next-of-kin or legatees of the legatee, though the legatee should die before it was payable.

Mr. Bethell and Mr. Purvis, contra.—The question is, whether the personal representatives of this legatee would, in the event of her death before marriage, be entitled to receive this legacy, or whether it would not sink into the land for the benefit of the devisee. The direction in the testator's will is in substance this, that the legacy should not be raised until her marriage. If the legatee was entitled to have the sum raised, it should have been invested in the names of the executors, and she would have had the interest of that investment; but that was not what the testator intended, for he said that the executors should be personally liable to pay interest, at the rate of 4l. per cent. The money was plainly to remain in the hands of the executors until the marriage of the legatee; and upon that event the testator points out the particular way in which it is to be paid—by an equal contribution from the three sons. So far, all the legatee had to look to was, the personal liability of the

sons. Then how stand the real estates affected? The testator gives them to his three sons, the executors, and he in effect says to the legatees, if you marry you shall have 2,000l., but to render that more secure I will charge that sum, if it should ever arise, upon my real estates. But the petitioner asks, that whether she marry or not, she should be declared to have a vested interest in it. The consequence of that would be, that she is entitled to present payment of it, or upon her death her personal representatives would be entitled to it. The distinction between a legacy charged upon real estate, and payable at a future time, and the same legacy charged upon personal estate, is, that in the first case, if the legatee die before the legacy became payable, it sinks into the real estate; but in the latter case the legacy will not sink into the personal estate, but be payable to the personal representatives of the legatee; see 2 *Pow. Dev.* by Jarman, p. 235, and the authorities there cited. It is submitted, first, that there is no gift of the 2,000l., but only of an annuity, namely, the interest on the 2,000l., and upon her marriage a personal liability upon the executors to pay 2,000l., and upon that event also, a charge upon the real estate. If that is not the true construction, but it is a legacy of 2,000l., then, it is submitted, that as it was charged upon the real estate, and payable at a future period, unless the legatee should live until that time, the legacy must sink into the real estate.

SIR J. CROSS.—There does not appear to me to be any ambiguity upon this will. The testator had at the time of making it three sons and two daughters. He gave to each of his daughters 2,000l. expressly, and he then said, "but I direct that my daughters shall let their said several legacies remain, continue, and be in the hands of my executors until they marry." He then goes on further, and after having given his real estate in portions to his three sons, he makes them his executors and trustees, and then charges the legacies upon this real estate, and directs the legacies to remain in the hands of his executors; and then he directs in what proportions his three sons are to pay those legacies by instalments, upon the

daughters' marriage. I therefore understand the will to be, that at the death of the testator, the daughters were bound to let their legacies remain in the hands of their brothers until they married. It remained therefore in their hands up to the time of their respective deaths. But the three sons being all dead, the direction in the will of the testator, for the daughters to "let their legacies remain in the hands of the sons," has become incapable of being performed. The words "let their said legacies remain," &c. seem equivalent to "lend." I think therefore, that this was a vested legacy, and payable either when the daughters married, or when all the brothers had died. The next question is, how is the money to be raised? The will directs that it shall be a charge upon the real estates, but I think that these estates are chargeable with it, and that the petitioner is entitled to the prayer of his petition. But whether the legacy was payable on the death of all the brothers or not, I am of opinion that it is payable now, in consequence of the bankruptcy.

Petitioner's costs out of the estate.

1840. }
Nov. 7. } *Ex parte POTTS in re AYRE.*

Petitioning Creditor—Infancy—Supersedeas.

Per Sir George Rose—*Where several persons have been petitioning creditors, and one of them turns out to be an infant, and the petitioning creditors wish to supersede the fiat, the petition for that purpose should state that the bankrupt has not obtained his certificate; that no sales have taken place under the fiat; that there are no other creditors upon whose debts a fiat can issue: and should pray, that the fiat may be superseded at the petitioners' costs, and without prejudice to any objection which the bankrupt may take.*

This was the petition of several petitioning creditors, who were co-petitioning creditors with one who was an infant; and the question was, whether the fiat could be superseded upon the petition of the petitioning creditors, one of them being an infant.

Mr. Flather, for the petition, cited *Ex parte Barrow* (1) and *Ex parte Morton* (2). The fiat is not valid, without the bond of all the petitioning creditors, in compliance with the statute; but the bond must be incomplete on account of the infancy of one of them; therefore, the fiat should be superseded.

SIR JOHN CROSS.—In *Ex parte Barrow*, which was the case of a petition presented by the solicitor who sued out the fiat, praying that he might be at liberty to give the necessary bond, instead of the petitioning creditor, who was an infant, the Lord Chancellor referred to the act of parliament, (5 Geo. 2. c. 30. s. 23,) and there he found that it required the same person to make the affidavit and give the bond; therefore, he refused the prayer of that petition, and ordered that the commission should be superseded. Then in *Ex parte Morton*, it was the petition of the bankrupt to supersede, upon the ground, that one of the petitioning creditors was an infant, and could not give the necessary bond. Sir Thomas Plumer superseded the commission, upon the application of the bankrupt. And if the bankrupt here made the application, which is now made, that case would be an authority for granting his application; but this is a very different case, and the Court must be satisfied that this is an invalid fiat at law.

SIR GEORGE ROSE.—It is a very different thing, where the petitioning creditors are the petitioners here, and where the bankrupt. The fiat is not had on account of one of the petitioning creditors being an infant; but, in the case of the bankrupt being the petitioner, he comes for a supersedeas, upon the ground of insufficient security for costs. The petitioning creditors can bring an action, and recover under their title by this fiat; but it does not follow that even where the fiat is invalid at law, this Court will supersede. No doubt, this is a supersedeable fiat, with the permission of the Court. In order to set the matter right, the petition should be amended, and state that the bankrupt has not obtained his certificate; that no sales

(1) 3 Ves. 554.

(2) Buck. 42.

have taken place under the fiat; that there are no other creditors upon whose debts a fiat can issue: and praying that the fiat may be superseded at your own costs, and without prejudice to any objection which the bankrupt may take.

SIR JOHN CROSS.—We do not give any opinion as to what order will be made upon that amended petition (3).

1841. } *Ex parte WEBBER in re WEB-*
Jan. 13. } *BER, A BANKRUPT.*

Arrest—1 & 2 Vict. c. 110—Costs.

A petitioning creditor hearing that the bankrupt was about to abscond, obtains a writ of capias under 1 & 2 Vict. c. 110, and arrests the bankrupt. The bankrupt, instead of applying for his discharge under that act, which he might immediately have done, remains in prison for a considerable time, and then presents his petition to this Court, praying for his discharge, and that the petitioning creditor should pay all his costs, losses, and expenses which he had thereby incurred. Ordered upon consent, that the bankrupt be discharged; but held, that the bankrupt was not entitled to any costs, losses, or expenses incurred by his imprisonment.

This was the petition of the bankrupt Samuel Webber, and it prayed that he might be discharged from the custody of the sheriff of Devonshire, and that the petitioning creditor might be ordered to pay all the costs, losses, damages, and expenses incurred by the petitioner, in consequence of his imprisonment.

It appeared, that on the 19th of October 1840, a fiat had issued against the bankrupt upon the petition of C. R. J.; and that on the 5th of November following, (the fiat being then in force,) C. R. J., the petitioning creditor, hearing that the bankrupt was about to abscond, caused him to be arrested, by virtue of a writ of *capias*, sued out under 1 & 2 Vict. c. 110, and dated the 28th of October, whereby, the bankrupt was required to procure bail for

(3) This petition has not since come before the Court; but it is presumed that the order would be made, upon the amendments intimated by his Honour Sir G. Rose.

the sum of 100*l.*, that being the same debt upon which the fiat had issued. The bankrupt, instead of applying immediately to the Judge who granted the *capias*, or to some other Judge, for his discharge, as he might have done under the same act by force of which he was arrested, remained in prison for upwards of two months, and now presented his petition, praying as above.

Mr. Swanston, for the petitioner, contended, that he was entitled to his discharge, and to be paid all his costs, losses, damages, and expenses incurred from his imprisonment, and cited *Ex parte Promise* (1).

Mr. Keene, contra, did not oppose the discharge of the bankrupt, but insisted that he was not entitled to be paid for any costs, losses, damages, or expenses, by reason of his imprisonment, for that it was the bankrupt's own fault, if any such were incurred, as the statute (1 & 2 Vict. c. 110.) empowered him to apply for his discharge immediately upon his arrest.

Mr. Swanston, in reply.—The cases have decided, that a petitioning creditor who has taken out a fiat against his debtor, thereby debars himself from proceeding at law. The statute has not altered the law in this respect; it has only qualified the power of courts of law to arrest; but still the Judge has a discretionary power to arrest in particular cases. And the petitioning creditor here, has called upon him to exercise his jurisdiction. If then, the petitioning creditor was wrong in arresting the petitioner, the petitioner cannot have made the proceedings of the petitioning creditor proper, by having remained in prison.

SIR JOHN CROSS.—Before I can determine this question in your favour, I must decide that the learned Judge who granted the writ was wrong in so doing, for he knew that the application was made by the petitioning creditor. If the plaintiff in that action was debarred by having taken out a fiat against the defendant, then the learned Judge was wrong in granting the writ. I cannot decide that point, so do not give any opinion upon it. But, as the petitioning creditor consents to the discharge, I

(1) 1 Glyn & Jam. 92.

have no hesitation in making an order to that effect. As to the question of costs, the petitioning creditor got the order for the arrest from the Judge, who was of opinion, that he was entitled to the special order, notwithstanding the bankruptcy. Upon the order being sued out, the bankrupt had a right to get it reviewed, and to shew cause against it, and this could have been done at a very slight expense; but, instead of doing so, he acquiesced in that order. It is probable, that the reason why he did not apply to have the order reviewed was, that he could not deny his intent to abscond. Inasmuch, therefore, as this party does not deny the intent to abscond, and as the creditor has no probability of recovering his costs out of the estate, I think the order ought to be made without costs. I make the order for the discharge, because the creditor consents to it, and not because the bankrupt was illegally arrested. I should be sorry to decide that the learned Judge had done wrong, particularly without first having a communication with him.

Order for the discharge made upon consent.

Order refused as to the costs, damages, and expenses.

1841. { *Ex parte* LEONARD FOSBROOKE
Jan. 30. { *in re* THOMAS FISHER AND
OTHERS, BANKRUPTS.

Solicitor—Costs, Taxation of—Assignee.

One of three co-assignees, who, in opposition to the wish of his co-assignees, proceeds to tax the solicitor's bill, and succeeds in taxing off one-sixth of the amount, is entitled to his extra costs incurred in so doing, by being obliged to employ a solicitor for himself: and the bankrupt's estate will be liable to the difference between the costs incurred on taxation, as between party and party, and as between solicitor and client.

This was the petition of Mr. Fosbrooke, who was one of the three assignees, who were chosen under the fiat issued against the bankrupts; and it stated, that Messrs. M. and B. were appointed to act as solicitors to the fiat: that their bills of costs, after the choice of assignees, amounted to 2,191*l.*: that the petitioner, being dissatis-

fied with the amount of these bills, applied to the commissioners to tax them, but that the commissioners refused to tax some of them, and as to others they only made a nominal taxation: that the petitioner then presented his petition to this Court, as an assignee, and also a creditor of the bankrupt's estate, praying that the bills should be referred for taxation: that upon that petition coming on to be heard, it was opposed by the petitioner's two co-assignees, but that the usual order for taxation was made upon it: that upon taxation, the sum of 552*l.* 16*s.* 9*d.* was taxed off, being more than one-sixth, whereby the solicitors were bound to pay the petitioner the costs of the application and the reference, which costs amounted to the sum of 128*l.* 17*s.* 1*½d.*; but that the same, being taxed as between party and party, was reduced to the sum of 75*l.* 6*s.* 0*½d.*, which was paid by Messrs. M. and B, leaving the sum of 53*l.* 11*s.*, the difference between the costs as taxed between party and party, and as between solicitor and client, to be borne by the petitioner: that the petitioner also incurred other expenses in obtaining the bills to be taxed, namely, 11*l.* 2*s.* 11*d.* for making copies of the bills of costs, to enable him to tax them; also 19*l.* 14*s.* 8*d.*, being the amount of his solicitor's bill for business done and for opinions of counsel, relative to the necessity of making an application to remove his co-assignees, on account of their opposing him in having the said bills taxed: that at a meeting of the commissioners, on the 17th of November 1840, the petitioner claimed to be allowed out of the bankrupt's estate, the said several sums of 53*l.* 11*s.*, 11*l.* 2*s.* 11*d.*, and 19*l.* 14*s.* 8*d.*; but that his co-assignees, objected to his being paid any of those sums, and that the commissioners refused to allow them accordingly, and stated their opinion to be, that under the said order for taxation, the petitioner was only entitled to his costs as between party and party, and that as to the sums of 11*l.* 2*s.* 11*d.*, and 19*l.* 14*s.* 8*d.*, the petitioner had no right to incur expense as against the bankrupt's estate, without the concurrence of his co-assignees. The petitioner then insisted, that he was entitled to the payment of those several sums, and also to the costs

incurred by this application, upon the ground, that as the application to tax the solicitor's bills was adverse to the solicitors to the fiat, it was necessary for him to employ some other solicitor for that purpose. The petition then prayed, that it might be referred to the officer of the court, to tax the petitioner his extra costs of the said former application, and the said reference, as between solicitor and client, and also to tax the petitioner his costs, charges, and expenses properly incurred in and about the petition, and to inquire whether the two sums of 11*l.* 2*s.* 11*d.*, and 19*l.* 14*s.* 8*d.*, have been properly expended by the petitioner, on behalf of the bankrupt's estate, and so much as should be allowed to be paid out of the bankrupt's estate.

Mr. Swanston and Mr. Faber, for the petitioner.—All that is asked for is, an order that the petitioner is entitled, in his character of trustee, to the ordinary privilege which all trustees have, namely, their extra costs. The petitioner does not ask to have these costs without inquiry, but that his costs may be taxed as between solicitor and client. There is no question, that through his means 55*l.* 16*s.* 9*d.* was recovered to the bankrupt's estate, and that in his attempt to accomplish this, he was met as an antagonist by his co-assignees. When this case was on before (reported 3 *Dea.* 687, s. c. 8 *Law J. Rep.* (n.s.) Bankr. 52), this Court said, that at least the co-assignees ought to have remained silent.

Mr. Wright, *contra*.—According to the report of the case in 3 *Dea.*, the petitioner procured the taxation, not in his character of assignee, but in that of a creditor. If so, has it ever been heard of, that a creditor who has taxed the solicitor's costs, and taken off more than one-sixth, is entitled to his extra costs? The petitioner was induced to have the bills taxed, solely from feelings of hostility to the solicitor; for all the other creditors and assignees were satisfied with the solicitor's bill, and at a public meeting passed a resolution approving of the solicitor's conduct and charges.

SIR J. CROSS.—In this case the petitioner is one of three assignees, and he being of opinion that the bills of costs of the solicitors should be taxed (but his co-assignees not being of that opinion), came to this

court to have them taxed. He was met in opposition by his co-assignees. He came here in the double character of assignee and creditor, so that he was a trustee, but beneficially interested; and, as such, he had a right to complain of his co-assignees, that they would not assent to the taxation. The bills were taxed off upwards of 500*l.*, and this sum has gone to the benefit of the creditors. When the commissioners met to divide this money, the petitioner applied to them to allow him the expenses he was put to in pursuing the inquiry, but the commissioners allowed him only his costs as between party and party. The other assignees applied for their full costs, and the commissioners thought fit to pay them. In that state of things the petitioner comes back to inquire whether he is entitled to be indemnified in the costs of the inquiry. Again he is met by his co-assignees, who insist that he is not to be allowed his costs as between solicitor and client. In opposition to this application, it is said, that in taxing the bills, the petitioner was actuated by adverse motives towards the solicitor, and that the bills were satisfactory to the other assignees and the creditors. It appears to me, that this is no answer to the application which has been made. Again, it is said, that this is an application to have a re-taxation of the petitioner's costs: this is not the case. His costs as between him and the solicitor to the fiat, have only been taxed as between party and party; but now the question is between one of the assignees, and the estate of the bankrupt. I am of opinion, that the petitioner is entitled to the order prayed, namely, to have the costs taxed as between solicitor and client.

Order as prayed.

1841. { *Ex parte* RANDALL *re* OAKES.
Feb. 4, 5, 9. { *Ex parte* BEACH *re* OAKES,
A BANKRUPT.

Solicitor, Misconduct and Removal of.

The Court will, upon the application of one of two assignees proving misconduct on the part of the solicitor, remove the proceedings from out of the solicitor's hands, although the other assignee is in favour of his continuance.

These were two petitions, one presented by Randall, one of the assignees, praying that the solicitor who had the conduct of the fiat, might be ordered to deliver up the proceedings, and be removed from being solicitor to the fiat; and the other by certain creditors, praying that Randall might be removed from the office of assignee.

The first petition was grounded upon certain acts of fraud and misconduct on the part of the solicitor, which were clearly made out by the evidence.

Mr. Swanston and *Mr. Rice*, for the respondent in the first petition, took the preliminary objection, that the Court had not jurisdiction over the solicitor; and that in fact it was a mere squabble between the two assignees, which should appoint a solicitor.

[*SIR J. CROSS*.—The solicitor and assignees are officers of the Court, and if the assignee comes and complains that the solicitor has proceeded irregularly, the Court has jurisdiction in such a case, and may deal with it.]

The Court looks upon the solicitor as the nominee of the assignees, and not as a creature of the Court. The Court will not inquire whether the solicitor is properly appointed or not; the only way to remedy the matter is, to apply to the Court to remove the assignee—*Ex parte Scruby* (1), *Frisby v. Bulmore*, before the Vice Chancellor, October 1828.

Mr. R. S. Parker, in support of the first petition, cited *Ex parte Bull* (2). Objection overruled.

SIR J. CROSS. — The legislature has thought fit to appoint this Court to have superintendence and controul over all matters in bankruptcy; and the question here is, whether the Court has superintendence and controul over the subject matter in this petition. The petition states, that on the same day that the docket papers were prepared by the solicitor's clerk, he prepared a warrant of attorney for a friend of the bankrupt, for a pretended debt of 200*l.*; that he kept the fiat in his pocket from the 30th of October, until the end of the next month,

(1) 1 Rose, 207, n.

(2) 3 Dea. & Ch. 118; s. c. 2 Law J. Rep. (n.s.) Bankr. 76.

and in the meantime entered up judgment; and that the sheriff was put in possession, and he, hearing of the fiat, refused to sell to the party to whom the attorney proposed to sell, namely, the son-in-law of the bankrupt. I do not say that this is all true; but if it be, the question is, whether the Court will not give relief, or will sit by and say, "we cannot interfere." I think it would be a strong case to say, that the Court has not jurisdiction over the matter in this petition. Now, these are very grievous charges against the solicitor. He is also charged, that after the choice of assignees, he did not take any steps to recover the effects of the bankrupt; and it is stated, that *Mr. Randall* put persons in possession of the effects, and that those persons were driven away by a number of persons who were instigated to this by the solicitor, and this charge is not denied. I am of opinion, that from the beginning to the end of the proceedings, the solicitor has been acting hostilely to the interests of the creditors. I am not aware that the Court has ever taken the proceedings out of the hands of the solicitor: but was there ever such a case as this before? I must therefore act upon general principles. I think I should lend myself to a gross fraud, if I suffered the proceedings to remain any longer in this solicitor's hands. The Court therefore orders, that he shall deliver up the proceedings, and pay the costs of the petitioner.

The cross petition dismissed, with costs.

1841. } *Ex parte F. J. BURGE AND*
Jan. 30; } *OTHERS, in re J. BAKER, a*
Feb. 9. } *Bankrupt.*

Friendly Society—4 & 5 Will. 4. c. 40—*Monies due and owing.*

A treasurer of a friendly society, established under the above act, and the 10 Geo. 4. c. 56, paid himself a debt due from a third party, out of the monies of the society, and took for the security of the society a very insufficient mortgage from his debtor, which mortgage two of the trustees of the society were induced to execute, they not knowing the contents of it:—Held, upon the bank-

ruptcy of the treasurer, that this was money due and owing from him to the society, at the time of his bankruptcy, within the meaning of the above act; and that the society were entitled to be paid in full, in priority to other creditors of the bankrupt.

The petitioners, in this case, were the trustees of the Blagdon Friendly Society, which was a society incorporated under the provisions of the 10 Geo. 4. c. 56, and 4 & 5 Will. 4. c. 40; and the object of the petition was, to obtain an order upon the assignees to pay a sum of 180*l.* to the petitioners, in preference and priority to the other creditors of the bankrupt, pursuant to the 12th section of the above act of Will. 4 (1). The eighth rule of the society was in these words:—"That John Baker, Esq. be a treasurer of this society, who shall be responsible for such sums of money as may from time to time be paid into his hands by the steward or clerk, or any other person, on account of this society, for the investment or application

(1) Whereby it is enacted, "that where any person already appointed, or who may hereafter be appointed to any office in a society established under the said recited act, 10 Geo. 4. c. 56, or this act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt or insolvent, or have any execution or attachment, or other process issued, or action or diligence raised against his lands, goods, chattels or effects, or property or estate, heritable or moveable, or make any assignment, disposition, assignment, or other conveyance thereof, for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right on the sheriff, or other officer executing such process, or the party using such action or diligence, shall within forty days after demand made in writing, by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society, to such person as such society or committee shall appoint, and shall pay out of the estates, assets or effects, heritable or moveable, of such person, all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process, or using such diligence, and all such assets, lands, goods, chattels, property, estates, and effects, shall be bound to the payment and discharge thereof accordingly."

of the same, under the authority of the trustees, in such manner as they shall direct."

Another of the rules of the society was to this effect:—"That the funds shall be invested pursuant to the 10 Geo. 4. c. 56. s. 13 (2), with the consent of the members on a quarterly night."

It appeared, that in June 1837, one W. V. was indebted to the bankrupt, in the sum of 180*l.*, but he not being able to pay this sum, or to give a proper security, the bankrupt paid himself this 180*l.* out of money belonging to the society, which was in his hands, and, without consulting the trustees of the society, had a mortgage prepared from W. V. to the society, of a small plot of land, which was not worth more than about 50*l.* This mortgage was dated the 18th July 1837, and purported to be a mortgage from W. V. to the trustees of the society, to secure the sum of 180*l.* and interest.

The bankrupt prevailed on two of the trustees to execute this mortgage, telling them, that their signature was only required as a matter of form, and without acquainting them with the purport of the deed. It appeared clear, that the whole transaction was a mere contrivance of the bankrupt to get his bad debt paid out of the money of the society, substituting them for himself as creditors of W. V.; and that in fact, no part of the 180*l.* was paid out of the society's money to W. V. It moreover appeared, that at the date of the mortgage, the bankrupt had not 180*l.* of the society's money in his hands.

Mr. Hallett, for the petitioner.—The 13th section of 10 Geo. 4. c. 56. only authorizes an investment by the treasurer of such monies as shall at any time be

(2) By the 13th section, it is enacted, "that it shall and may be lawful for the treasurer or trustee for the time being of such society, by and with the consent of such society, to be had and testified in such manner as shall be directed by the general rules of such society, to lay out and dispose such sums of money as shall at any time be collected, given, or paid to and for the beneficial ends, intents, and purposes of such society, as the exigencies of such society shall not call for the immediate application or expenditure of, &c., and that all the dividends, interests, and proceeds which shall from time to time arise from the monies so laid out or invested as aforesaid, shall from time to time be brought to account by such treasurer or trustee."

collected, given, or paid; but in this case, the 180*l.* was not in existence: how then can this be looked upon as a security, which can bind the society? Neither was the rule of the society complied with, which requires the consent of the trustees on a quarterly night. The whole transaction was a fraud upon the society, and it would have been a matter of course, upon the trustees filing their bill in Chancery against the treasurer, to order him to bring the money into court—*Beaumont v. Meredith* (3), and *Rothwell v. Rothwell* (4). This sum must, therefore, be looked upon as "a sum of money remaining due, which such person received by virtue of his office;" and is, therefore, payable before any of his other debts.

Mr. Osborn, contrà.—The trustees were, by virtue of the eighth rule of the society, the persons who were to be intrusted with the investment of the monies of the society. If, then, the trustees thought fit to intrust the bankrupt with the investment, are they to come and demand payment in full of their claim, in preference, although it was through their own negligence that the loss was incurred? By the 33*rd* section of the 10 Geo. 4. c. 56, the treasurer would have been obliged to have given in an account yearly of the funds and effects of the society; therefore the trustees must have known that this sum was applied by the treasurer contrary to the rules of the society; and they have allowed it to remain upon this insufficient security. It follows, therefore, that the petitioners do not stand in a position to entitle them to take advantage of the 4 & 5 Will. 4. c. 40. In *Ex parte Stamford Friendly Society* (5), Lord Eldon, in speaking of the 33 Geo. 3. c. 54, which was very similar to the 10 Geo. 4. c. 56, said, "My opinion is, that the legislature did not intend that these societies should have the very large remedies given to them by this act of parliament, unless the money was dealt with precisely as the act directs." But in the present case, there has been a gross departure from the statute, and also from the rules of the society.

Mr. Hallett, in reply, was not called upon by the Court.

(3) 3 Ves. & Bea. 180.

(4) 2 Sim. & Sta. 217.

(5) 15 Ves. 282.

SIR JOHN CROSS.—This is a petition of the trustees of the Blagdon Friendly Society, which was established under 10 Geo. 4. c. 56, and it claims the sum of 180*l.* in full, from the estate of the bankrupt, who was their treasurer. The claim is made under the 4 & 5 Will. 4. c. 40. s. 12. There is no question but that this society is in conformity with that act; and the assignees have admitted the claim of the trustees, in respect of another debt due from the bankrupt; but they insist that this sum of 180*l.* was not money remaining due from the bankrupt, within the meaning of the act. It comes then very much to a question of fact; and it appears to have been thus: that the bankrupt, having a bad debt due from W. V., paid himself out of the monies of the society; not, indeed, out of monies then in his hands, for it appears that he had only 80*l.* in his hands at the date of the mortgage, but he retained that, and subsequently the further sum of 100*l.* The bankrupt then having contrived it thus, procured a mortgage to be executed in the manner appearing upon the petition; but the mortgagor never touched one farthing of the society's money; the bankrupt retained it all in payment of his own bad debt. Under these circumstances, I think that the 180*l.* was money remaining due to the society at the time of the bankruptcy; and that the prayer of the petition must be granted. *Ordered as prayed.*

1840. }
Nov. 5. } *Re BAKER.*

Fiat—Venue.

*Case in which a fiat was directed to London, instead of country, commissioners, the debts amounting to 1,400*l.*, and creditors to the amount of 1,300*l.* residing in London.*

Mr. Keene applied for a fiat in this matter to be directed to commissioners in London, instead of commissioners at Hastings. The bankrupt carried on his business at Hastings, and his debts amounted to 1,400*l.*, but of this sum creditors to the amount of 1,300*l.* resided in London.

Per Curiam.—Take the order.

1841. }
Jan. 13. } *Ex parte* BEER in re BEER.

Act of Bankruptcy—Absence from Dwelling-house.

A trader, who was in insolvent circumstances, failed to attend a general meeting of his creditors, which was convened at his house of business, sending his solicitor in his place:—Held, that this was an act of bankruptcy, and that it was the bounden duty of the bankrupt to attend, and give information to his creditors as to the state of his affairs.

This was the petition of the bankrupt to supersede, on the ground of no act of bankruptcy. In the month of July last, the bankrupt, being in insolvent circumstances, was waited on by one of his creditors, who proposed to him that he should execute an assignment of his property to a trustee, for the benefit of his creditors. The bankrupt refused to make an assignment, but at the same time proposed a composition, which the creditors declined. The creditors then, upon conversing with the solicitor of the bankrupt, came to the conclusion, that it would be right that a general meeting of the creditors should be called, and in this the solicitor concurred. A meeting was accordingly convened to assemble at the bankrupt's house of business, upon a particular day; and upon that day all the creditors of the bankrupt assembled at the appointed place, but the bankrupt did not attend; he having gone to his father's (ten miles from his house of business), as the bankrupt stated, for the purpose of borrowing money to meet the demands of his creditors. The solicitor of the bankrupt attended the meeting, but, in consequence of the bankrupt's absence, the creditors were not able to come to any arrangement as to the steps to be taken. A short time afterwards a fiat issued, and he was thereupon found bankrupt, upon his non-attendance, as an act of bankruptcy. There was a great deal of evidence both ways, but it was left in uncertainty whether the bankrupt had made any promise that he would attend the meeting which was to take place at his house. However, it was perfectly clear, that he knew that such a meeting was to take place. The solicitor, who attended the meeting for

him, stated at the meeting, that he had advised the bankrupt not to attend, but to leave the matter to him.

Mr. Girdlestone, for the petitioner.—This is not an act of bankruptcy: to make it such it will be necessary to prove, not only that the bankrupt promised to attend the meeting, but that he failed to do so with an intent to delay his creditors. Even had he promised to attend, this promise was complied with by his sending his solicitor, and deputing him to act for him. The very cause of his absence was to enable him to liquidate the demands of his creditors — *Tucker v. Jones* (1), *Ex parte Lavender* (2).

Mr. Swanston, for the respondents, was stopped by the Court.

SIR J. CROSS.—The application is made on the part of the bankrupt, to annul the fiat, upon the ground of no act of bankruptcy. The alleged act of bankruptcy is, that he failed to attend a meeting of his creditors, which was convened for the purpose of taking into consideration the state of his affairs; and that he did so with an intent to delay his creditors. It was urged by his counsel, that that intent was not proved. But I am of opinion, that it was not for the respondents to prove the intent, the overt act shewing such *prima facie* intent, but for the petitioner to prove that such was not his intent. Has he done so? I think not. The bankrupt was insolvent in the beginning of July, when a creditor called upon him, to whom he admitted his insolvency. Now, in a state of insolvency, one of three courses may be pursued—an assignment, a composition, or bankruptcy. The creditors in this state of things pressed for an assignment of the bankrupt's property, for the benefit of his creditors: the bankrupt was not inclined to make an assignment, but offered a composition: this the creditors refused, insisting either on an assignment or bankruptcy. The creditors then concurred with the bankrupt's solicitor, in the propriety of calling a meeting of the creditors, and accordingly notice of a meeting to be held at the bankrupt's place of business, for the purpose of

(1) 2 Bing. 2; s. c. 2 Law J. Rep. C.P. 98.

(2) 4 Dea. & Ch. 484.

taking the state of his affairs into consideration, was given and circulated amongst all the creditors of the bankrupt. The creditors attended, but the bankrupt did not make his appearance; sending in his stead his solicitor. Now, who could give a proper statement of his affairs but the bankrupt himself? Could the solicitor answer the various questions which the creditors might wish to put, relative to the bankrupt's affairs? As well might he be looked upon as a sufficient substitute for the bankrupt, at the examination before the Commissioners. It is clear, that the bankrupt knew that the meeting was to take place; but then it is said, that he did not promise to attend. I think this is quite immaterial to the question, for it was the bounden duty of the bankrupt to attend, and to give such information to his creditors as he was able. He was not even at his house of business that day, but went to his father's, a distance of ten miles. No, say they; he was recommended by his solicitor not to attend there; perhaps for fear that the creditors might ask him some questions which he might not like to answer. The question is, did he absent himself with intent to delay his creditors? He has failed to make out the contrary, and I am of opinion that he went away for the purpose of avoiding an assignment of his property, which he feared his creditors might have insisted upon. I think it was the bounden duty of the bankrupt to have attended the meeting.

Petition dismissed.

1841. } *In re* WRIGHT, A BANKRUPT.
Jan. 30.

Official Assignee — Securities — 1 & 2 Will. 4. c. 56. s. 22.

The Court will, with the concurrence of the bankrupt's assignees, permit the official assignee to retain in his hands certain securities of the bankrupt, where transferring them into the Bank would cause delay and inconvenience in getting in the estate, and settling the accounts of the bankrupt.

Mr. Swanston, on behalf of the official assignee, applied to the Court, with the con-

currence of the assignees chosen under the fiat, for an order to empower him to retain in his hands a large number of promissory notes, instead of transferring them into the Bank, according to the provisions of 1 & 2 Will. 4. c. 56. s. 22, upon the ground that it would cause great delay and inconvenience in taking the accounts, and getting in the outstanding debts, many of the notes having satisfaction as to part, indorsed, and other circumstances, which rendered it necessary to have constant reference to them. The 22nd section, after directing that the official assignee shall transfer all monies into the Bank of England, proceeds in these words: "to be subject to such order, rule, and regulation for the keeping the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the said Court of Review, or any Judge of the said Court of Bankruptcy, if authorized so to do by any general order of the same Court, shall direct."

SIR J. CROSS.—Since the assignees concur in this application, it follows, that the Court may make the order prayed.

Ordered accordingly.

1841. } *Ex parte* MARSHALL *in re*
Feb. 6. } MARSHALL, A BANKRUPT.

Act of Bankruptcy—Assignment for Benefit of Creditors—Fraudulent Preference.

When a creditor assents to an assignment of his debtor's property for the benefit of his creditors, it must be taken to be an assent to the common assignment in such cases, and not to one by which the debtor's solicitor is given priority over other creditors, in respect of costs incurred, or to be incurred in defence of an action touching the debtor's property, or where one creditor is given a preference over any other creditor, without the knowledge and consent of such other creditor.

And where such assent has been given by a creditor, he will not be thereby prevented from taking advantage of the assignment, as an act of bankruptcy, upon the insertion of any such unusual provisions.

This was the petition of the bankrupt; and it prayed that the fiat which had issued against him, upon the petition of William Nicholson and John Nicholson, might be annulled at their costs.

It appeared, that in May 1840, the bankrupt, who was the lessee of a public-house called the "Rising Sun," in the parish of St. Pancras, entered into an agreement with one Thomas Sneezum, for the sale thereof, for the sum of 3,765*l.*, the stock in trade to be taken at a valuation. That Sneezum thereupon deposited the sum of 100*l.* in the hands of the petitioner; but that afterwards he refused to complete the contract, upon the ground, that the petitioner could not make a good title to the premises, and thereupon commenced an action for the recovery of the deposit of 100*l.* and damages.

The petitioner at the time of the action being commenced, was indebted to Messrs. John and William Nicholson, Messrs. Reid & Co., and two other firms, in various sums of money, amounting together to the sum of 4,550*l.*, Messrs. Reid & Co.'s debt being secured by the deposit of the lease of the premises. The petition stated, that upon the 12th of November last, the petitioner went to his said creditors accompanied by a clerk of his solicitor; and having represented to them the situation of his affairs with respect to Sneezum, and that if he obtained a verdict in the action which he had commenced, it would be very injurious to his creditors, proposed that he should execute a conveyance of all his estate to a trustee, for the benefit of his creditors, and to this proposal Messrs. Reid & Co. assented, and also the other creditors of the petitioner. The evidence was extremely conflicting as to the nature of the assent which Messrs. Nicholson gave. The petitioner swore, that he, accompanied by his solicitor's clerk, called upon the Messrs. Nicholson, and explained to the said William Nicholson the state of his affairs, and of the action which was then pending; and that he proposed to execute an assignment for the benefit of his creditors, and asked the said William Nicholson if he approved of and would consent to the same; and that W. N. said, "he thought it was the best thing that could be done for the interest

of petitioner's creditors." And that he, on behalf of himself and his partner, fully sanctioned and approved of the said assignment being executed by the petitioner.

This evidence was confirmed by the solicitor's clerk.

On the other hand, William Nicholson in his affidavit swore, that he had not assented to any such assignment by the bankrupt, but that after the bankrupt and the clerk had stated some circumstances relative to the bankrupt's affairs, and made some observations, which he told them he could not clearly understand, he said to them, "that an assignment might, perhaps, under the circumstances they had stated, be the best step, and then wished them good morning."

It appeared, that on the 12th of November, the petitioner executed an assignment of the premises, which was comprised in Messrs. Reid & Co.'s equitable mortgage, to one William Evamy, upon trust for payment of Messrs. Reid's debt, and that on the following day, the petitioner executed a deed of assignment to the said William Evamy, of all his household goods, stock in trade, and all other his personal estate and effects, upon trust, for the benefit of all his creditors; and this deed, after reciting the said deed of assignment of the previous day, proceeded to direct the trusts in the following manner, "that is to say, in the first place, by, with, and out of the said trust-monies, to pay and satisfy the costs, charges, and expenses of preparing and executing these presents, and said other indenture of assignment hereinbefore mentioned or referred to, and also the costs, charges, and expenses already incurred, or which shall or may arise, or be occasioned in or by the defence of an action at law brought, and now in prosecution, by or at the suit of Thomas Sneezum, against the said Thomas Marshall, and all other the expenses which have been incurred previously to the execution of these presents, or shall be incurred in the sale and in the execution of the trusts hereby created, and subject thereto, in trust to pay and apply the residue of the said trust monies, in or towards the satisfaction and discharge of the several debts due and owing, as well to the said Messrs. Reid & Co., for what shall or may remain due to

them in respect of the principal monies and interest, after applying the produce of the said messuage or tenement, cottage and premises comprised in the said lease, in case the same shall not be equal to the discharge of such principal monies and interest, as to the said several parties hereto of the third part, (meaning the creditors,) by an equal pound-rate, according to the amount of the several debts, and without any preference or priority of payment whatsoever."

It further appeared, that the petitioner caused a notice of this assignment to be inserted in the *Gazette*, and that upon Messrs. Nicholson being informed of it, they immediately, upon consulting with their solicitor, gave directions that a fiat should be sued out against the petitioner. Accordingly a fiat was sued out on the 5th of December by Messrs. Nicholson, under which, the petitioner was adjudged bankrupt, the act of bankruptcy being the execution of the said deed of assignment by the petitioner.

Upon the petitioner's solicitor attending the commissioner with the said deed of assignment, upon an order to that effect, the solicitor to the fiat said, that it was not the assignment that he objected to, but the provision made therein for payment of the solicitor's costs, in priority to the other creditors; whereupon the solicitor for the petitioner offered, if the fiat were not persevered in, to give up all claim for his costs out of the petitioner's estate, which offer the solicitor to the fiat would not accept. Subsequently to the deed of assignment, the plaintiff obtained a verdict in the cause of *Sneezum v. Marshall*, leave being reserved to the defendant to move to enter a non-suit, on the ground that the contract of sale was unstamped.

Mr. Swanston and *Mr. Bacon*, in support of the petition.—The petitioning creditors having assented to an assignment for the benefit of creditors, cannot, even supposing the clause objected to in the deed of assignment to be unusual, take advantage of it as an act of bankruptcy; the only effect would be, that the deed would be void *ab initio*. In *Ex parte Bayly* (1), the Vice Chancellor held, that a creditor who was

(1) Mont. & M'Ar. 438.

present at a meeting where the question of an assignment was discussed, and who neither assented nor dissented to the proposed deed, had sufficiently assented, for the purpose of preventing him from afterwards taking advantage of it as an act of bankruptcy. But it is submitted, that the clause providing for the payment of the solicitor's costs, was only such as the solicitor was entitled to, for had *Sneezum's* action failed, then the solicitor would have been entitled to a lien upon the title-deeds, in respect of his costs. It was but right, therefore, to provide for the solicitor's costs, as the defence to the action was conducted for the benefit of the creditors—*Marshall v. Barkworth* (2).

Mr. James Russell and *Mr. Rolt*, contrà.—The petitioner has not proved that the Messrs. Nicholson assented to any assignment by him for the benefit of his creditors; for the evidence is strongest that they did not. But taking it that they did assent to an assignment, still the question remains—would such an assent (which at the most could be taken but to refer to a common deed of assignment,) warrant the insertion of such a special clause as has been inserted in the present case? Even supposing that they had assented to this deed, still it must fail, for *Sneezum*, who has recovered in his action, would have been a creditor of the petitioner, and not having assented to the deed of assignment, it would have been an act of bankruptcy.

[*SIR JOHN CROSS*.—If you shew a preference to one creditor, without the knowledge of the petitioning creditor, that will be sufficient. I think it rests with the other side to make out that you were a consenting party to the special clauses; the evidence is extremely conflicting as to the general assent.]

Mr. Swanston, in reply.—It is unnecessary to shew that the petitioning creditor assented to this particular deed. The circumstance of his having assented to any, is sufficient to prevent him taking advantage of it as an act of bankruptcy. See *Marshall v. Barkworth*.

SIR JOHN CROSS.—There is much conflict of evidence whether *W. Nicholson* did

(2) 4 B. & Ad. 508; s. c. 2 Law J. Rep. (N.S.) K.B. 75.

or did not consent to an assignment for the benefit of the creditors. Nicholson says, that he did not intend to give his assent to an assignment, but that he had only acquiesced in entertaining the proposition, and had by no means given an assent to its execution. At the same time, I do not doubt that the other party went away from the interview with him, with the impression that he *had* assented to the assignment: but if so, to what assignment? The only thing proposed, was a common assignment to a trustee for the equal benefit of all the creditors; and that was the only assignment which he could be presumed to have assented to. But what is the deed in question? A very different one: first of all, it gives to the solicitor, who prepared the deed, and who is the attorney for the debtor in an action brought against him, a lien upon his estate and effects, in priority over all his creditors, "for all his costs, charges, and expenses, already incurred, or which shall or may arise or be occasioned in or by the defence of an action," &c. It is not pretended that Mr. Nicholson assented to any deed of this kind; but it is said, that the deed is what is relied upon as the act of bankruptcy, and that he assented to a deed. And it is thence argued, that because the deed contains something that the creditor did assent to, that therefore he cannot take advantage of it. Suppose, that instead of this deed containing all the matters in one instrument, it had been divided into two; and suppose, that in the first, the debtor had executed a conveyance of all his estate and effects, as a security to the solicitor for all costs incurred, and in future to be incurred, in an action: can any one doubt that this would have been a fraudulent preference and an *act* of bankruptcy? Is it then less an act of bankruptcy, because it is embodied in a deed to which the creditor is said to have assented. The deed in the present case, is nothing like that, to the execution of which, the petitioning creditor could be presumed to have assented. I am of opinion, that the part of the deed which provides for the payment of the solicitor's costs, is a fraudulent preference, and the deed an act of bankruptcy.

The petition must be dismissed.

1841. } *Ex parte* LAWDEN *in re* STAND-
Feb. 8. } LEY, A BANKRUPT.

Proof—Admission—Answer.

The Court will not order the commissioners to enter a proof for a particular sum, admitted by the bankrupt (who was a trustee and executor,) to be due from him to his testator's estate, in his answer to a bill filed by a legatee against him prior to his bankruptcy, although the original writ of execution issuing out of the Court of Chancery, was produced, commanding the defendant to pay those particular sums into court within one week; but will only make the common order for the petitioner to make such proof as he may be advised, the writ of execution not being satisfactory evidence of the existence of such a proveable debt, it being in its nature more an order pendente lite.

The bankrupt was one of two trustees and executors under the will of one R. B. His co-trustee and executor had died, having accounted with him for such parts of the testator's estate as had come to his hands. The petitioner was a legatee of 500*l.*, under the will of the testator, and she, prior to the bankruptcy, filed her bill against the bankrupt Standley, praying that an account might be taken of the testator's estate come to the hands of Standley, and that the trusts of the will might be performed. Standley put in his answer on the 12th of November 1840; and from the schedules thereto it appeared that there was due from him to the estate of the testator, the sum of 2,914*l.* 17*s.* 6*d.*, which was admitted by him to be in his hands; and by the third schedule it appeared that he had invested the sum of 1,310*l.* on certain promissory notes, and took credit for that sum, for payments made by him on account of the testator's estate.

By an order of the Court of Chancery, dated the 11th of January 1841, Standley was ordered to pay into court, to the credit of the cause, those two sums of 2,914*l.* 17*s.* 6*d.* and 1,310*l.*, which appeared, from the schedules to his answer, to be in his hands. It appeared, that Standley had placed in the hands of his solicitor, the sum of 700*l.*, to be applied in part discharge of the legacies payable under the

said will; but that he had not paid the said two sums into court, in compliance with the order of the Court, when, on the 25th of January 1841, a fiat issued against him, under which he was duly declared bankrupt. This petition was now presented by the petitioner, for liberty to prove, on behalf of herself and the other legatees, for the amount admitted due to the testator's estate; and it prayed, that the petitioner might be at liberty to prove, under the said fiat, for the sums of 2,914*l.* 17*s.* 6*d.* and 1,310*l.*; and that the commissioners might be ordered to receive such proof accordingly, or that the petitioner might be at liberty to prove for those sums, minus the sum of 700*l.*; and that the commissioners might be ordered to receive such proof, and to allow a claim to be entered for the said sum of 700*l.*; and that the petitioner might be at liberty to vote in the choice of assignees, or that the choice of assignees might, if necessary, be adjourned, till such proof should be received. The petition was served upon the bankrupt and the petitioning creditor, but they did not appear.

Mr. Swanston and Mr. Koe, for the petitioner, cited *Ex parte Shakeshaft* (1) and *Ex parte Moody re Warne* (2).

[SIR JOHN CROSS.—This is not a mere application for leave to go in before the commissioners and prove, but it is an application that the commissioners may be desired to receive proof for a particular sum, as if already ascertained. I can give you an order to go in and prove; but as this Court is bound to stand on strict rules of evidence, I do not think there is evidence sufficient before me, to warrant my directing proof to be admitted for any particular sum.]

Mr. Swanston then produced the original writ of execution issuing out of the Court of Chancery, reciting the above order of the Court, and commanding the defendant to pay the particular sums therein mentioned, into court; within one week.

SIR JOHN CROSS.—That is not a final adjudication. I can only give the common order. Without more satisfactory evidence,

I cannot adjudge this to be a proveable debt; the writ of execution only shews, that the bankrupt was ordered to bring a particular sum of money into court *pendente lite*.

Mr. Koe asked that the choice of assignees might be postponed until the petitioner could go before the commissioners to establish his proof, the choice of assignees being to take place next day. This was refused, but the minutes of the order were declared sufficient information to the commissioners, that the petitioner had obtained an order to go in and prove.

1841. } *Ex parte NEWHOUSE in the*
Jan. 26, 27. } *matter of NEWHOUSE.*

Account—Assignee—Audit.

Account refused as to personal estate after seventeen years: granted as to rents and profits of real estate.

In 1823 a commission of bankruptcy issued against the petitioner; a dividend was declared in 1825 of 15*s.* in the pound; no dividend had been since made, nor did it appear that any personal estate had since come to the hands of the assignees. The Court refused an order on the petition of the bankrupt, that the surviving assignee should account for the personal estate, but made an order to account for the rents of the real estates.

As to the personal estate, the audit upon the dividend must be taken as evidence of the correctness of the accounts up to that time.

This was the petition of the bankrupt, and it prayed that an account might be taken of the dealings and transactions of the assignees, as to the estate and effects of the petitioner. The petition stated, that in 1823 a commission had issued against the petitioner, under which he was declared bankrupt; that John Peace and Frederick Jones were chosen assignees thereunder; that the whole amount of debts proved against the estate of the petitioner, amounted to the sum of 607*l.* 2*s.* 7½*d.*; and that in the year 1825 a dividend of 15*s.* in the pound was paid by the assignees, leaving only the sum of 151*l.* 16*s.* 3*d.* due and owing from the estate of the petitioner;

(1) 3 Bro. C.C. 198.

(2) 2 Rose, 413.

that at the time of the issuing of the commission, the petitioner was entitled in fee to certain premises, which were of the value of 1,600*l.*; that the assignees entered into possession of them, or into the receipt of the rents and profits thereof, but that since the year 1825 they had made no further dividend of the petitioner's estate, nor accounted for the same.

The petition charged, that personal property had been got in since the year 1825, which had not been accounted for by the assignees. It appeared that the real estate of the bankrupt was subject to a mortgage for 800*l.*, at 5*l.* per cent., and that the property was worth 80*l.* a year for the first two years after the bankruptcy, and 65*l.* a year afterwards.

John Peace died lately, insolvent; and the bankrupt presented this petition, praying that the surviving assignee should account. The respondent, Frederick Jones, (the surviving assignee,) stated, in his affidavit, that immediately upon being informed by his co-assignee that he was chosen an assignee of the petitioner's estate, he declared to him that he would not act as an assignee; and that, being assured by Peace that he would never be called on to act as such, he omitted to renounce the appointment; but that he had never acted in any manner as an assignee of the estate of the bankrupt, nor had he entered into possession of any of the real property of the bankrupt, nor into the receipt of the rents and profits thereof; and that he had never received any part of the bankrupt's estate, until after the death of his co-assignee; but he admitted that he did, for the sake of conformity, and to avoid putting the estate to the expense of appointing a new assignee, join in executing one or more deed or deeds of conveyance of some part or parts of the bankrupt's estate, which had been sold by the said John Peace; but that he did so upon the representation of Peace (his co-assignee), who was also solicitor to the commission, who told him that his signature was only required for the sake of conformity; that he did not receive any part of the purchase-money, but that the whole was received by Peace; and that the petitioner was aware that he (Jones) had never received any part of his estate and effects. This evidence was con-

firmed by the affidavit of the son of John Peace, the deceased assignee.

Mr. Swanston, for the petitioner, contended, that he was entitled to an account of his real and personal estate from the time of his bankruptcy against the surviving assignee; that Jones should have declined the office of assignee; and that, by not doing so, and thereby allowing a new choice, the property had been wasted; that a trustee could not plead lapse of time as against his *cestui que trust*, except in cases of adverse claim on the part of the assignees.

Mr. K. S. Parker, contra, cited *In re Litchfield* (1), *Primrose v. Bromley* (2).

Mr. Swanston, in reply.

SIR JOHN CROSS.—In this case a commission was sued out against the petitioner as far back as the year 1823. He states in his petition that two assignees were appointed, Peace and Jones; that in the course of two years the debts proved against his estate amounted only to 607*l.* 2*s.* 7½*d.*; and that a dividend had been paid thereon of 15*s.* in the pound; but he does not shew that since that time there has been any transaction with respect to the personal estate, and it was as competent for the petitioner to have called upon the assignees to account for the personal estate fifteen years ago, as it is at present. I was a little surprised, in the course of the argument, to hear counsel for the petitioner state, that time was no ingredient between trustees called on to account, and their *cestui que trust*; but I find that in the case of *Smith v. Clay* (3), also reported in a note to *Deloraine v. Browne* (4), and cited in *Hercy v. Dinwoody* (5), Lord Camden said, "A court of equity is not active in giving relief against conscience and public convenience. Nothing can call this Court into activity but conscience, good faith, and reasonable diligence; where they are wanting, the Court is passive and does nothing. Laches and neglect are discouraged; therefore there is always a limitation to suits in this court." I think,

(1) 1 Atk. 78.

(2) Ibid. 89.

(3) Amb. 645.

(4) 3 Bro. C.C. 633.

(5) 2 Ves. jun. 92.

therefore, that I ought not now, after the petitioner has so long neglected to call for an account, to permit the account, as to the personal estate, to be gone into. But the assignees have actually been receiving the rents of the real estate up to the present day. I think, therefore, that, as far as regards the real estate, the bankrupt has a right to the order of the Court; but as to the personal estate, I think the audit upon the dividend must be taken as evidence of the correctness of the accounts, up to that time. Had the bankrupt traced any of the personal estate into the hands of the assignees subsequently to the order of dividend, he might be entitled to an account as to the personal estate also.

Account refused as to the personal estate; but ordered, that the surviving assignee should account for such of the rents and proceeds of the real estate as may have come to his hands.

1841. } In the matter of ELY, A BANK-
Feb. 1. } RUPT.

Practice.—Order *ex parte*—Rule to shew Cause—*Vivâ Voce Examination*.

Where the Court are divided in opinion upon the bankrupt's petition to supersede, one Judge being of opinion that there is no petitioning creditor's debt, the other not being satisfied on the evidence, and no order is made, but the petition retained,—the bankrupt may, upon an ex parte application, obtain an order for bringing his petition into the paper for hearing, and for a vivâ voce examination thereon. And this order is analogous to a rule to shew cause at common law.

This was a motion, on the part of the assignees of the bankrupt, to discharge an order obtained *ex parte* by the bankrupt, that his petition should come again into the paper, and that witnesses should be examined *vivâ voce*, under the following circumstances:—In Michaelmas term last, the bankrupt's petition to supersede upon the grounds of no petitioning creditor's debt, and no act of bankruptcy, came on to be heard before this Court, which then consisted of two Judges, one of whom was of opinion that the bankrupt had made

out his case for a supersedeas; but the other learned Judge was not satisfied with the evidence, and did not think it a sufficiently clear case to supersede, intimating an opinion, that the question as to the petitioning creditor's debt should be tried by an issue.

The consequence was, that, the Court not being agreed, there was no order made upon the petition; but the petition was retained. The bankrupt afterwards applied *ex parte*, and obtained the order complained of, and which was sought to be discharged by this motion.

Mr. James Russell and *Mr. Anderdon*, in support of the motion.—This was an order which should not have been made behind the backs of the respondents. Bringing a petition again into the paper should be the subject of a special application, more particularly where it is not simply to be brought into the paper again, but with the addition that there shall be a *vivâ voce* examination, and that when the whole matter in dispute had been gone into and discussed upon affidavit—*Ex parte Baldwin* (1).

Mr. Swanston, contra, was stopped by the Court.

SIR JOHN CROSS.—There is no rule of practice in question here. But for the enormous expense, I should have preferred sending it to a jury. I think it is more fit that the case should be reheard upon *vivâ voce* evidence, as proposed. A great deal has been said, that this was an order made behind the backs of the respondents: it was not so; that is a misunderstanding. Had I been sitting in a court of common law, I should have said, "Take a rule to shew cause;" but in this court it is more usual to make an order, leaving it to the other side to move to discharge it if he please, which, in effect, is a rule to shew cause. And in this case the order was nothing else than a rule to shew cause.

[*Mr. Russell.*—The merits have not been gone into. The motion has been merely to discharge the order upon the ground of irregularity.]

[His Honour said that he would hear anything which could be urged against the order.]

(1) 1 Mont. & Ayr. 617.

SIR JOHN CROSS.—Here is a petition in court, but all the proceedings are suspended; and there has been simply an application to set it going. And the question is, what is the best way? I think the shortest way is to have a *viva voce* examination. In deference to Sir George Rose's opinion, I must have more evidence; but until I am satisfied that there are assets, I will not send it to a jury. Were there three Judges now in this court instead of one, it would be a matter of course to rehear the petition.

Motion refused.

1841. { *Ex parte* HARVEY GEM AND
May 31; { JAMES POOLEY, in the matter
June 1. { of JOHN RUMSEY, A BANK-
RUPT.

Trading—Solicitor—Scrivener.

If a solicitor or attorney, practising as such, shall also be in the habit of receiving other men's monies or estates into his trust or custody, for the purpose of investing them in securities, as he may be able to procure them, and practise such business as a trade, he will be considered a trader, liable to the bankrupt laws.

And it will be unnecessary to consider whether he was properly a scrivener or money broker, but only whether he was a person "receiving other men's monies into his trust and custody."

The fiat in this case had issued against the bankrupt, describing him as a "money scrivener, dealer and chapman."

The present petition was presented by certain creditors of the alleged bankrupt, Rumsey, on behalf of themselves and other creditors, &c.; and it prayed a superseas, upon the ground that Rumsey was not a "money scrivener, dealer and chapman," or in any other way a trader within the meaning of the bankrupt laws. The petition stated, that for the last fourteen years Rumsey had carried on the business or profession of an attorney and solicitor at High Wycombe, in the county of Bucks, and that all business, which he had transacted for his clients, was strictly in the

character of an attorney and solicitor, and not in that of a money scrivener.

The respondents insisted, that there were various transactions in which money had been placed in Rumsey's hands by his clients, for the purpose of being lent on securities as Rumsey could procure them; and, moreover, that he charged procuration fees to the borrowers of the money. The evidence on the part of the respondents was first gone into.

James Crook deposed, that he had known Rumsey for the space of seven years then last past, during which time he used and exercised the trade, business, or profession of a money scrivener, receiving other men's monies and estates into his trust and custody, and making merchandise thereof, and sought and endeavoured to get his livelihood thereby, as others of the same trade and business usually do. And he further deposed, that he knew Rumsey to have had monies lodged in his hands by his clients and others, for the purpose of being invested in securities, and that upon the money being invested, Rumsey charged not only for the mortgage deed or assignment, and conveyancing part of the business, but also certain fees, bonuses, or compensation for himself for procuring the said money. And he further deposed, that on or about Christmas, 1839, one John Rixon placed in the hands of Rumsey a certain sum of money for the purpose of being invested in securities, which Rumsey was to procure; that he, this deponent, in the month of September 1836, applied to Rumsey for the purpose of raising the sum of 2,000*l.* on mortgage of certain property, which sum Rumsey accordingly obtained for deponent, and charged deponent a certain bonus or compensation for himself, over and above the charging for preparing the mortgage deeds, &c.

The depositions, as to the trading, upon which the fiat had issued, were those of William Bransford Hatchett, who had been the clerk of the bankrupt. Subsequently to the issuing of the fiat, he made an affidavit directly opposed to his depositions; and it was now objected, that the depositions could not be read in evidence, but this objection was overruled. In his depositions he stated, that he had known

Rumsey for the space of twenty-six years, during the last five years of which he had been employed by him as his clerk, in keeping the books and accounts of the office; and that during the said term of five years, Rumsey did use and exercise the trade, business, or profession of a money scrivener, receiving other persons' monies and estates into his trust and custody, and making merchandise thereof, and sought and endeavoured to get his livelihood thereby, as others of the same trade and business usually do; that he knew Rumsey to have had money lodged in his hands by his clients and others, for the purpose of being invested in securities, and upon the said money being so invested, Rumsey had charged not only for the mortgage deed or assignment, and conveyancing part of the business, but also certain fees, bonuses, or compensation for himself for procuring the loan.

Ralph Spicer, a solicitor, deposed, that he had known the bankrupt for the last ten years, during which time he had frequent communications with him, and had numerous opportunities of knowing the nature of many of the business transactions of the bankrupt; and that he knew that the said bankrupt carried on the profession, business, or employment of a money scrivener, as well as that of an attorney and solicitor, and verily believed that his business of a money scrivener was fully equal to that of a solicitor and attorney; and that the said bankrupt was always considered and taken to be a money scrivener, and as such a trader within the meaning of the bankrupt laws.

W. J. Collier deposed, that he knew that on many occasions his father had lodged in the hands of the bankrupt various sums of money for the purpose of being invested in securities, as he, the said bankrupt, could find or procure them.

It appeared, by the books of the bankrupt, that in all the cases set forth in the depositions of W. B. Hatchett, and in many other cases, a certain charge was made against the persons borrowing the money, for attending them, receiving instructions, &c. prior to the procuring of the money required by them.

The evidence, in support of the petition

consisted of the affidavits of the different individuals who were mentioned by W. B. Hatchett, in his said depositions, as instances of procuration fees. This evidence amounted to this: that they employed the bankrupt as a solicitor in preparing certain mortgage securities for them, and that they did afterwards pay his bill of costs, for preparing such mortgage securities, attendances, letters, and for the parchment and stamps necessarily made use of thereon, but that they did not, on such transactions, or at any other time, either directly or indirectly, give any fee, bonus, or compensation to, or was any fee, bonus, or compensation demanded by, the said bankrupt, over and above his bill of costs as such solicitor as aforesaid, for procuring any sum or sums of money for or on behalf of them.

W. B. Hatchett, in his affidavit, which was filed in support of the petition, stated, that at the time he made his said depositions, he was misled, in point of law, by supposing that, because there appeared in the books of Rumsey several instances of charges for attendances, respecting the procuring of the money, prior to the charges for instructions for drawing and engrossing the deed, that such charges were the charges of a money scrivener, and made a solicitor a money scrivener; and that he had no reason or ground other than that, for saying, that the said John Rumsey had charged fees, bonuses, or compensation in these instances; that he had since seen a bill of costs of the said James Crook, which Rumsey had made out and delivered to him; and that in such bill there were items of solicitor's attendances charged, relative to the procuring of money, similar to those in the instances referred to in his depositions; and that he verily believes, that the bonus and compensation, referred to in the affidavit of said James Crook, was no other than the amount of the several fees charged for attendance, exclusive of the items for drawing and engrossing the mortgage deed.

The following is a copy of the bill of costs in one of the instances referred to in the depositions of W. B. Hatchett, as cases where he considered that procuration fees had been charged, and will be sufficient to

shew the system of charges in such cases, on the part of the bankrupt.

| | £. | s. | d. |
|---|----|----|----|
| Feb. 22. Attending you on your application for loan of 250 <i>l.</i> , conferring thereon, and agreed to procure same..... | 0 | 3 | 4 |
| March 18. Clerk's attending at Mr. Morris's to look over the title-deeds relating to the property in mortgage to him, and upon which you desired to raise a sum of money on mortgage, and taking epitome of title, and horse hire | 1 | 1 | 0 |
| — 25. Writing you that it would not be convenient to settle the business relative to a further advance required by you for a few days | 0 | 0 | 0 |
| — 27. Writing Messrs. W., as to advance of 500 <i>l.</i> out of the trust monies of the late Mr. D, to enable you to pay off Mr. Morris, and have the mortgage in one sum..... | 0 | 3 | 6 |
| — 29. Writing long letter to Mr. D, as to advancing you the 500 <i>l.</i> , now invested in Exchequer bills, left by the late Mr. D, to be laid out in augmentation of the Lee living | 0 | 3 | 6 |
| April 11. Attending you as to the advance when you stated that Mr. Morris had intimated to you, that he thought he could advance some..... | 0 | 0 | 0 |
| — Attending you, and administering oath to affidavit prepared by you, for proof of your debt under bankruptcy.. | 0 | 2 | 6 |
| — Attending Mr. D. and explaining to him the nature of the property offered by you in mortgage, when he consented to let you have the 500 <i>l.</i> , unless he should otherwise dispose of it in a few days | 0 | 3 | 4 |
| — 21. Writing to Mr. D, inquiring if you might rely upon the advance of the 500 <i>l.</i> as requested..... | 0 | 3 | 6 |
| — Attending you on your stating that Mr. Morris had consented to advance you 200 <i>l.</i> at Midsummer, and that, consequently, you would not require the money from Mr. D..... | 0 | 3 | 4 |
| June 22. Instruction for further charge from you to Mr. Morris | 0 | 6 | 8 |

Then came the regular charges for preparing deeds, &c.

Mr. Swanston and *Mr. James Russell*, in support of the petition.

Mr. Anderdon and *Mr. Montagu Chambers*, *contrà*.—*Rumsey*, though a solicitor, was also a money scrivener or money broker. There is nothing to prevent a man being both a solicitor and a money scrivener. *In ex parte Bath re Burman* (1), *Best*, C.J. remarked, "If an attorney joins with his business of an attorney the business of a scrivener, he is not less a scri-

vener because he is an attorney, nor would he be less a coal merchant if he were to unite the two characters of coal merchant and attorney. Now, in all the instances proved in this case, the money remained, not in the hands of the party's own banker, but in the hands of Mr. Burman, until he could procure suitable security on which to lend it. Was not this receiving men's monies into his trust or custody?" So in the present case, instances are shewn of money being deposited with the bankrupt, to remain in his hands until he could procure a suitable security. True, there were no charges for procuration *eo nomine*; but that matters not, if there were charges which were virtually procuration fees. In *Hutchinson v. Gascoigne* (2), *Wood*, B. said, "It does not signify whether he receives it as procuration money, or in any other name or shape; it is substantially the business of a scrivener."

Mr. Swanston, in reply.—There has been no case of trading made out against the alleged bankrupt.

[*SIR J. CROSS*.—Perhaps there may be no one instance of trading sufficient to bring the party within the bankrupt laws: still the question remains, whether the Court will not infer that the procuration business was done for a profit. From a combination of facts, the Court may draw a conclusion of fact. It seems to me, that *Rumsey* received other men's monies into his trust and custody, within the meaning of the act 6 Geo. 4. c. 16. s. 2.]

The Court cannot, without evidence, infer that, as to a particular transaction, there had been a particular charge: this charge must be shewn to have been made. It must also be shewn, that there was a seeking of a livelihood by the trade of scrivening; but there is no profit shewn to have arisen to the bankrupt, except in his regular way of business, and as incidental to his business of an attorney or solicitor. Supposing that there was such an instance shewn, there would remain to be shewn a general intent to carry on the business of a scrivener. In *Ex parte Warren* (3), there was a distinct charge by *Warren* for scrivining; but it was held, that as the trans-

(1) *Mont.* 82.

(2) *Holt*, N.P.C. 509.

(3) 2 *Sch. & Lef.* 414.

action might have been incidental to his character of a solicitor, he was not a scrivener. Lord Redesdale said; "This distinction may be fairly drawn in every case, viz. whether the business transacted was incidental to the character of an attorney or solicitor, or distinct from it;" and again, "It is not to be implied, that every attorney who transacted a loan of money, and took money for transacting the loan, was subject to the bankrupt laws." Lord Kenyon, in the case of *Hamson v. Harrison* (4), determined, that the mere receiving other men's monies, charging commission on the receipt, and employing the money whilst in his hands for his own benefit, did not make a man a scrivener, and said, "I think, therefore, it must be now pretty well understood, that an attorney or solicitor, acting in his common and ordinary business, and merely taking procuration money upon a loan, does not thereby become a scrivener, liable to the bankrupt laws."

[SIR J. CROSS.—Do you contend, that if there had been an habitual system of scrivening made out in that case, in conjunction with the business of an attorney or solicitor, that he would not have been considered a trader?]

Yes; no matter how many instances of procuration, if they were incidental to the business of attorney or solicitor. That case was a clear instance of scrivening; but the doubt was, whether it was a substantial case of scrivening, or merely incidental to the profession of an attorney or solicitor. In *Ex parte Paterson re Bryant* (5), the Lord Chancellor, in giving judgment, said, "The next question is, as to the trading as a scrivener. That does not depend upon the fact, whether the bankrupt has or has not occasionally done acts which a scrivener peculiarly and properly would have done; not upon what he may have done upon one day, and what upon another, but upon his intention generally to get a living by so doing." In *Ex parte Malkin re Adams* (6), the question of scrivening was sent to an issue; and Gibbs, C.J., in directing the jury, fully adopted the view of the Lord Chancellor, in *Ex parte Pa-*

terson, and observed (7), "Although he may, as an attorney, incidentally have acted as a scrivener, that will not constitute him a scrivener within the bankrupt laws." And, in the same case, Gibbs, C.J. said (8), "Though an attorney may have incidentally acted as a scrivener, that is not sufficient. Though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of that sort, occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be 'using the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody.'" I admit, that in *Hutchinson v. Gascoigne*, it was decided, that an attorney, who becomes a general depositary of the money of his clients, and of other persons, which he invests upon securities, charging, in addition to his fees for preparing the securities, a compensation (no matter by what name), is a trader within the meaning of the bankrupt laws; but, in the present case, they have not shewn one instance of charges in addition to his proper charges as a solicitor. Are they not all charges which he was entitled to make as an attorney? A solicitor is to charge for his attendance upon his client, upon the subject of a loan about to be procured. In *Hurd v. Brydges* (9), Dallas, J. agreed with the remarks of Gibbs, C.J. in *Ex parte Malkin*, and observed, "The attorney was predominant. The bonds, judgments, warrants of attorney, by which the annuities are secured to the grantor, were prepared in his office, and he charged for them. These charges, in which it is said, the annuity commission was included, were the subject of taxation. In all the cases which have been adduced in evidence, this man acted as an attorney." This, therefore, cannot be held to be a trading as a scrivener, without overruling *Ex parte Warren*.

SIR JOHN CROSS.—Much confusion has arisen in the construction of the former acts of parliament, respecting the profession of a scrivener, which may not now

(4) 2 Esp. N.P.C. 555.

(5) 1 Rose. 405.

(6) 2 Ibid. 27.

(7) 2 Rose, 31.

(8) 3 Campb. N.P.C. 540.

(9) Holt, N.P.C. 656.

apply to the present state of the law; by the stat. 21 Jac. 1. c. 19, it was enacted, "that where any person should use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, he should be liable to be made a bankrupt." Now, the terms are, "use the trade or profession of a scrivener;" so that the question then was generally, whether the party did use the *trade* or *profession* of a scrivener; and the mere receiving of other men's monies into their trust and custody, was not of itself sufficient to subject the party to the bankrupt laws, unless he carried on the *trade* or *profession* of a scrivener. Then came the next general act of the 5 Geo. 2. c. 30, which extended the liability to become bankrupt to all persons that at that time seemed to come within the class of persons having the trust of other men's monies. By the 39th section of that act, after reciting, that "whereas persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons," it was thereby enacted, "that such bankers, brokers, and factors, shall be and are hereby declared to be subject and liable to this and other the statutes made concerning bankrupts." So that, although the act of Jac. 1. included none but persons who were by trade scriveners, yet the subsequent act further extended it to two other classes, who came within the description of persons receiving other men's monies into their trust and custody, and that had the tendency to refer the courts to a consideration rather as to the circumstance of the party receiving other men's monies into his trust, than as to the denomination of the trade which he pursued. But then came the last general act of the 6 Geo. 4. c. 16, which enacts, "That all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, shall be deemed traders liable to become bankrupts." Now, the Courts seem to have continued, after the act of Geo. 2, to test the liability of the person to become a bankrupt, by the circumstance of receiving other men's monies into their trust or custody, rather than from the fact of the existence of a trade;

and this act classes together all the known descriptions of persons who did receive other men's monies into their trust and custody; and I have heard of no case which confines this description of person to any particular trade, either of a banker, or broker, or factor, &c., but the act extends to every person who shall practise as a trade the receiving other men's monies into his trust or custody; and such persons are liable to the bankrupt laws. It seems to me, therefore, that under this last act of parliament, upon which I go altogether, the bankrupt Rumsey was properly the subject of a fiat in bankruptcy. Not one of the cases cited upon the other side applies to the construction of this new act; therefore I think that I am not bound to consider, whether he was a banker, or a broker, or a scrivener, but merely whether he was a person "receiving other men's monies into his trust and custody." And I am of opinion, that the evidence sufficiently proves, that he did receive other men's monies into his trust and custody; and that he has practised the business of a money broker (to use a generic term), and, as such, he is clearly liable to this act of parliament.

Petition dismissed, with costs.

1841. } *Ex parte* WILLIAM BURNETT
Feb. 10; } *re* EDWARD BLAKE, A BANK-
March 16. } RUPT.

Petitioning Creditor—Joint and Separate Debt—Separate Fiat.

A joint and separate creditor, who sues out a separate fiat against his debtor, he having a separate debt of sufficient amount to support the fiat, is excluded from the general rule, which permits a petitioning creditor in a separate fiat to prove and receive dividends upon his joint debt.

The petitioner in this case was the petitioning creditor, who was a separate creditor of the bankrupt for 290*l.*, and a joint creditor to a much larger amount. The fiat, which was a separate fiat, was sued out upon the gross amount of the debt. The commissioners rejected the proof for the joint debt, upon the ground that the separate debt of 290*l.* was sufficient to support

the fiat, without the assistance of the joint debt. The question was, whether the commissioners were right in so doing.

Mr. Swanston and Mr. Girdlestone, in support of the petition.—A petitioning creditor in a separate fiat, has an undoubted right, according to the well established rule, to prove under that fiat the amount of the joint and separate debts due to him from the bankrupt; and the commissioners had no right in this case to say, "we will take the separate debt alone to support the fiat, and upon that alone shall you receive dividends." The petitioning creditor sued out the fiat upon the entire debt, and no more upon one portion of it than another. In *Ex parte Elton* (1), Lord Loughborough said, "With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out. He is precluded from suing at law; and it would be against all equity, having done it for their benefit, to refuse him the fruit of that for his own debt." In *Ex parte Hall* (2), Lord Eldon held, that the petitioning creditor in a separate commission, being a joint and separate creditor, was entitled to prove his entire debt, and said that, "being the petitioning creditor, he has a right, like the separate creditors;" see also *Ex parte Ackerman* (3). In *Ex parte Detastei* (4), although the petitioning creditor was a trustee for another joint creditor, as to part of the joint debt sought to be proved under his separate fiat, yet Lord Eldon held the rule to be so well settled, that he permitted him to prove, for the purpose of receiving dividends upon the whole debt, and cited *Ex parte Crisp* (5), as settling the general rule. A joint creditor, who sues out a joint fiat, pledges himself to enforce his demand upon the joint estate, and is not at liberty to go against the separate estate. This was the reason in *Ex parte Barned* (6), where Vice Chancellor Leach held, that the creditor of a surviving and deceased partner could not prove against the separate estate of

the surviving partner, because it was to be considered as a joint fiat; and he there applied the doctrine, that a joint fiat restricts the right of a joint creditor to the joint estate. The cases have gone to this extent, that even where the petitioning creditor had proved his joint debt against the joint estate, and received dividends, upon refunding the dividends, he might prove against the separate estate—*Ex parte Bolton* (7). The commissioners cannot determine upon what portion of a debt the petitioning creditor is to sue out a fiat. The fiat is as much supported by the joint as by the separate debt. Suppose that the separate debt turned out to be gone, or insufficient, would the fiat be bad on that account? When is this to be looked upon as a valid or an invalid fiat? Could the commissioners, in obedience to Lord Loughborough's order of 1798, have said to the petitioning creditor, "You have satisfied us as to the existence of a debt of 100*l.*, and we won't examine further into your debt"?

[*Sir J. Cross*.—I do not think it was the object of that order, to do more than desire the commissioners to take care that there was a sufficient petitioning creditor's debt. Certainly the inquiry often draws out a long statement, because it is frequently the result of an intricate account.]

From *Ex parte Ward* (8), it is plain, that the Lord Chancellor considered that the fiat was to be supported by the entire debt of the petitioning creditor, for there the debt consisted of three notes, upon two of which only the petitioning creditor had proved, and had brought his action upon the third; but the Lord Chancellor held, that he could not sue at law, and said, "he has determined his election by taking out the commission, and the affidavit on suing out the commission is general; nor does it mention the particulars by which a bankrupt becomes indebted." There, the creditor, before his commission, might have brought three actions, and yet, for the purposes of the commission, they were looked upon as one debt. Here, the petitioning creditor has two legal rights, but each supports the fiat. There is no-

(1) 3 Ves. 239.

(2) 9 Ibid. 349.

(3) 14 Ibid. 604.

(4) 17 Ibid. 247; s. c. 1 Rose, 10.

(5) 1 Atk. 134.

(6) 1 Glyn & Jam. 309.

(7) 2 Rose, 389.

(8) 1 Atk. 153.

thing in the 62nd section of 6 Geo. 4. c. 16. to limit this right of a petitioning creditor. It is clearly settled, that if a joint creditor sues out a separate fiat, he is entitled to prove and to receive dividends with the separate creditors. The question is, whether there is any difference in the application of that rule, where the petitioning creditor happens to have an aggregate debt made up of joint and separate debts, which separate debt is sufficient of itself to support a fiat, without calling in aid the joint debt. There is no case in the books which decides this point; but looking to the principle of the cases which have been decided, this case is governed by them. The cases decide, that where a joint creditor sues out a separate fiat, he thereby makes his election to proceed under the administration in bankruptcy, and cannot afterwards proceed at law in respect of any portion of his debt, for which he could maintain his remedy under the fiat. But the petitioning creditor is entitled to receive dividends upon his entire debt, as the fiat issues upon the whole debt, for when he comes before the commissioner, it is not necessary for him to prove any particular portion of his debt, or the nature of it. In *Ex parte Bryant*, it was contended, that because the petitioning creditor's affidavit stated, the debt to be a simple contract debt, he could not prove a judgment debt. But, the Lord Chancellor held, that it was not necessary to prove a debt of the same nature, or of the same amount as that contained in the affidavit, and said, "that it was never required that the affidavit should state the debt, with the precision of a special pleader bringing an action upon it." They also cited—

Ex parte Bryant, 1 Ves. & Bea. 214.

Ex parte Crinson, 1 Bro. C.C. 270.

Ex parte Hopkinson, 1 Ves. jun. 159.

Ex parte Callow, 3 Ves. 1.

Ex parte Moore, Buck, 521.

Ex parte Marston, Mont. & Ch. 576;

s. c. 9 Law J. Rep. (N.S.) Bankr. 5.

Mr. Bethell and Mr. James Russell.—

The effect of granting the prayer of this petition would be, to extend the anomaly of the rule, as to the right of a petitioning creditor to prove his joint debt under a separate fiat, beyond the reason of the rule. It is admitted, that there is no au-

thority in the books for the proposition contended for by the other side. Could not the petitioner in this case proceed by an action against the other debtors? It has been often decided, that if there is a petitioning creditor who has taken out a fiat in respect of a separate debt, he is not thereby prevented from proceeding against his other co-debtors, in respect of a joint debt. A petitioning creditor in a separate fiat, who is simply a joint creditor, is given the benefit of the exception, because he has sued out a fiat for the benefit of the separate creditors, and has thereby elected not to proceed at law; but in the present case, the suing out a separate fiat cannot be looked upon as a case of election to proceed in bankruptcy, so far as the joint debt is concerned, for the separate debt is sufficient of itself to support the fiat. In *Ex parte Elton*, Lord Loughborough did not extend the doctrine further than that. In *Ex parte Barned*, it was held, that where a joint creditor sues out a commission against A, "as surviving partner of B," he can claim only against the joint estate of A. The Vice Chancellor put it upon the reason, that under such a fiat the joint estate might be administered; and that as the joint estate was to be administered, the petitioning creditor need not have had recourse to a separate fiat. If the position of a petitioning creditor be such as to enable him to follow the joint estate, he cannot pursue the separate estate; but in the present case the petitioning creditor might commence an action in respect of the joint debt against the solvent debtor, and he would not be restrained; if so, then he stands in the same position as the petitioning creditor in *Ex parte Barned*, so that where the right to go against the joint estate is intact, his right to go against the separate estate does not exist. *Ex parte Barned* has no bearing upon this question. All that case settles is, that a commission against a surviving partner is, for some purposes to be considered as a joint fiat; so that was not the case of a joint creditor suing out a separate fiat, but a fiat against the bankrupt in his character of a surviving partner. In *Ex parte Read* (9), the only question was, whether the

(9) 1 Rose, 460.

petitioning creditor having a right against the bankrupt and his two co-debtors, he could unite the bankrupt with them in his action. *Ex parte Ward* does not prove that this was an election on the part of the petitioning creditor; for that was the case of a petitioning creditor having three distinct demands, but the bankrupt was the sole debtor in respect of each debt, and this was before the 49 Geo. 3. *Ex parte Hall* goes no further than *Ex parte Acker-*

man.
Ex parte Stevens, Cooke's B.L. 39.

Young v. Hunter, 16 East, 252.

Heath v. Hall, 4 Taunt. 326.

Mr. Smaston, in reply.—It cannot be affirmed of any particular portion of the debt, that it does not support the fiat: the entire debt supports it.

SIR J. CROSS. — In this case William Burnett is the petitioner in the matter of Edward Blake. The petitioner is a creditor of the bankrupt E. B., for a debt of 289*l.*, and there is no question, but he is entitled to charge the separate estate of the bankrupt with that debt. But he has another debt of a much larger amount, namely, for the sum of 4,500*l.* owing to him by the bankrupt jointly with another person of the name of Blake, who had formerly been his partner; and it was insisted on the part of the petitioner, that as he is the petitioning creditor, he is entitled not only to charge the separate estate of the bankrupt with his separate debt, but also the separate estate of the bankrupt with his joint debt, by virtue of the general rule under which the petitioning creditor is considered entitled to charge the separate estate of a bankrupt, against whom he has sued out a separate fiat. The case was argued at great length, and numerous reported cases referred to; but it is remarkable, that not one of those cases touches the question here, namely, whether a creditor, who is both a separate and joint creditor, is entitled in respect of the general power of petitioning creditors, to prove both the joint and separate debt against the separate estate of the bankrupt. It is remarkable, that all the books of reports and books of practice are silent upon that question. Nothing therefore remains, but to determine the question with reference to general princi-

ples. Now, it is considered a principle of equity, that a petitioning creditor, who sues out a fiat against a bankrupt, is entitled to charge the separate estate with his joint debt, because he has sued out a fiat, and given the creditors the advantage of taking the benefit of it, but has no option himself of afterwards suing the bankrupt. But in this case there is no necessity for looking to the joint debt for the support of the fiat; the fiat does not require any support from the joint debt, nor do the separate creditors derive any benefit from the joint debt of the petitioner. It seems to me therefore, that there is no reason or necessity requiring that the privilege should be conceded to the petitioning creditor of proving both debts. The fiat is supported from the separate debt alone. The petitioner therefore is entitled only to charge the separate estate with the separate debt, and not the joint debt.

Petition dismissed; both parties to pay their own costs, the assignees to take theirs out of the estate.

1841. } *Ex parte SPILLER in re WAR-*
April 30. } *TERS, a BANKRUPT.*

Assignees; Choice of, vacated—Improper Rejection of Proof—Judgment Creditor.

The commissioners, upon improper grounds, rejected a proof by a creditor, of a debt larger in amount than all the other debts of the bankrupt, the object of the solicitor's opposition to the proof being, to prevent the creditor voting in the choice of assignees:—Held, that the choice should be vacated, and that the creditors should make a new choice.

A judgment creditor need not produce an office copy of the judgment, as a proof of his debt, when he elects to go in under the bankruptcy, to make his proof as for a simple contract debt.

This was the petition of the public officer of the Northampton Banking Company, who were creditors of the bankrupt, for the sum of 4,907*l.* and a fraction; and the object of it was, to obtain an order for proof to that amount to be admitted; and that the choice of assignees should be

vacated, and for a new choice. It appeared that the banking company were the holders of certain bills of exchange, to the above amount, accepted by the bankrupt; that the bankrupt had given them a warrant of attorney to enter up judgment on the bills; and judgment had accordingly been entered up, and execution taken out. Subsequently, upon the 1st of March, a fiat issued against the bankrupt, upon which it became a question whether it would be more beneficial for the company to proceed with their execution or relinquish it, and prove their debt under the fiat.

On the 18th of March, the first meeting was held, but no one attended on behalf of the banking company to prove. Between that period and the next meeting, which took place on the 2nd of April, the company determined that it would be more for their advantage to give up the execution, and to go in under the fiat. Accordingly, at the second meeting, the company attended, by the petitioner, for the purpose of proving, under the fiat, their debt, of the above amount, which was for monies advanced by the bank to the bankrupt. The solicitor to the petitioning creditor then objected to the admission of the proof, and required the petitioner to produce the banking books; and also to produce an office copy of the judgment, which had been entered up against the bankrupt. The petitioner could not comply with either of these requests, but tendered the usual affidavit as to the existence of a debt to the amount stated, and requested of the commissioners to postpone the choice of assignees, which was to take place on that day, for a few hours, for the purpose of obtaining the office copy of the judgment. This request was refused, and the choice of assignees was proceeded with. The question was, whether that choice of assignees should not be vacated, the petitioner, whose debt was of sufficient amount to have chosen other assignees, having been improperly rejected; and, as it appeared to the Court, rejected for the purpose of preventing the bank voting in the choice of assignees.

Mr. James Russell and *Mr. Wright*, in support of the petition.—The petitioner is entitled to have a new choice of assignees. The object of rejecting the proof,

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was evidently to influence the choice of assignees, and not *bonâ fide* to prevent the proof. It is absurd to say, that it was necessary to have produced the office copy of the judgment; the question of the judgment was not in issue. One proof was tendered, not upon the judgment, but upon a simple contract debt. The judgment was gone directly upon making the proof.

The following cases, in support of a new choice of assignees, were referred to:—

Ex parte Gregnier, 1 Atk. 91.

Ex parte Surtees, 12 Ves. 10.

Ex parte Butterfill, 1 Rose, 192.

Ex parte Durent, Buck, 201.

Ex parte Milner, 3 Dea. & Chit. 235;

s. c. 3 Law J. Rep. (n.s.) Bankr. 73.

Ex parte Edwards, Buck, 411.

Ex parte Hawkins, *ibid.* 520.

Ex parte Danby, Mont. 67.

Mr. Swanson and *Mr. Prior*, for the respondents.—The argument on the other side would go to this, that whenever the commissioners err in judgment, by rejecting a proof which would have carried the choice, that party so rejected, is entitled to have a new choice; but all the cases which have been decided upon this subject, have drawn this very intelligible distinction, that where the commissioners have exercised their judgment, though erroneously, and the choice of assignees has been by a substantial number of creditors, the choice will not be vacated. In *Ex parte Surtees*, it was held, that nothing but the exclusion of a legal right by fraud, will vacate the choice of assignees. The cases cited from *Buck* are to the same purport, and were cases where there had been no substantial choice. Therefore, where there is only an error of judgment by the commissioners, a substantial choice will not be disturbed. An office copy of the judgment ought to have been produced.

Ex parte Duncannon, 1 Cooke's B.L. 126.

Ex parte Frith, 1 Gl. & Jam. 165.

Mr. Russell, in reply, was stopped by the Court.

SIR JOHN CROSS.—It is the duty of this Court, upon all fit occasions, to remove assignees. It is much the custom of all

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Courts, to lay down some rules for the exercise of its judgment; but, in the course of my experience, I have found that some of those rules defeat the ends of justice, in particular cases coming before the Court. For the present purpose, I will admit that the Court will never exercise a power to set aside the choice of assignees, unless the Court find, that the proof rejected was of sufficient amount to defeat the choice. We must look at the circumstances of the case. Here is a banking company which has an undisputed debt of 4,907*l.*; they had obtained judgment and execution upon the eve of the bankruptcy; they endeavoured to derive all the advantage they could from the judgment, and upon the 13th of March (the first meeting) they were doubtful as to the propriety of relinquishing their execution, and the commissioners adjourned the choice to the 2nd of April. By the next meeting, they had made up their mind to come in under the fiat, and on the 2nd of April the petitioner attended, and tendered proof for their debt, monies advanced to the bankrupt, abandoning all benefit under the execution, and claiming to prove only in respect of their simple contract debt—there was an end to the execution and judgment. He was required to produce the banking books. Could he take the banking books to the meeting of the commissioners? And he was asked, what was the amount of the debt when the warrant of attorney was given, and when the execution was sued out? which, indeed, he could not answer without the books. The solicitor then, who had the conduct of the proceedings, objected to the proof, as it seems, for the purpose of influencing the choice of assignees, he knowing that he would not retain the proceedings after the proof was admitted. The objection was taken, not because the debt was disputed, but because the petitioner did not produce the office copy of the judgment. He did not come to take any benefit from it; therefore it was quite unnecessary that he should produce it. He then asked the commissioner to adjourn the choice of assignees for a few hours, but this was refused him. The real question all the time was, who should choose the assignees. Under these circumstances, and without

imputing any blame to the commissioners, I am of opinion, that the choice of assignees was not fairly carried. I think the solicitor procured an unfair choice; and that being so, I am of opinion it ought to be set aside. The question of vacating a choice of assignees, is now a very different question as to costs, than what it was formerly; for now the very choice of new assignees vests the estate in them, and takes it out of the old.

Usual order for removing the assignees, and for new choice.

Costs of both parties out of the estate.

1841. } *Ex parte* EDWARD VARNISH in
Feb. 10; } *re* FREDERICK BURGHART, A
Mar. 17. } BANKRUPT.

Act of Bankruptcy—Deposit of Lease—2 & 3 Vict. c. 29. not retrospective—Annuity—Proof.

A debtor makes a deposit of a lease with his creditor for securing his debt, the debtor at that time having committed an act of bankruptcy, of which the depositor had no notice; a fiat afterwards issues against the debtor, assignees are chosen under it, and then the 2 & 3 Vict. c. 29. passes:—Held, that the bonâ fide deposit of the lease was not protected by the statute, from the effect of the secret act of bankruptcy, the assignees having been appointed before the passing of the act.

*The bankrupt, in consideration of 7,000*l.*, granted an annuity of 924*l.* 14*s.* for his life, he to be at liberty to redeem the whole annuity for 7,000*l.*, and upon such repurchase of the said annuity, the grantee was to assign any policy or policies of assurance which he should or might have effected upon the life of the bankrupt. The grantee effected assurances, and then the grantor became bankrupt:—Held, that the grantee was entitled to prove for the value of the full amount of the annuity, without deducting the yearly premiums, and without giving up the policies to the assignees.*

The petition stated, that by an indenture bearing date the 9th of June 1830, and made between the bankrupt of the one

part, and the petitioner of the other part, after reciting that the petitioner had contracted and agreed with the bankrupt for the absolute purchase of an annuity, or clear yearly sum of 92*l.* 14*s.* for the life of the bankrupt, free from all deductions whatsoever, by quarterly payments, as therein mentioned, subject to the agreement therein contained, for the repurchase of the said annuity at or for the price of 7,000*l.*, and reciting that for securing the payment of the said annuity, the said bankrupt had, by a warrant of attorney, bearing even date with that indenture, authorized certain attorneys therein named, to confess a judgment against him in the Court of King's Bench, in an action of debt for the sum of 14,000*l.* and costs of suit, it was witnessed, that in consideration of the sum of 7,000*l.* sterling to the said bankrupt paid by the petitioner, the bankrupt, for himself, his heirs, executors, and administrators, covenanted with the petitioner, his executors, administrators, and assigns, that he would pay, or cause to be paid unto the petitioner, his executors, administrators, and assigns, for and during the natural life of him, the said bankrupt, one annuity or clear yearly sum of 92*l.* 14*s.*, payable quarterly. And by the said indenture the bankrupt also covenanted, that he would, upon reasonable notice at any time or times thereafter, at the request and desire of the petitioner, his executors, administrators, or assigns, appear in person so often as there might be occasion for so doing, at any office or place of insurance within the cities of London and Westminster, or either of them, or send the petitioner, his executors, administrators, or assigns, notice of his place of abode, and such vouchers as might be required respecting his state of health from time to time, in order that the petitioner, his executors, administrators, or assigns, or any of them, if he or they should think fit, might insure the life of the said bankrupt for any sum or sums of money not exceeding the sum of 7,000*l.*, and that he would not leave the kingdom, or go abroad, or take upon himself any military or naval employment, without giving such notice as therein mentioned, in order to enable the petitioner to make known the same to the office or offices where the life of the said bankrupt might be insured, to

the end that the additional premium or premiums on such policy or policies might be paid, and that he, the said bankrupt, would pay all such additional premiums as the petitioner might from time to time pay for keeping such policy or policies on foot, in respect of the matter last aforesaid; and by the said indenture it was declared and agreed between and by the said parties, and particularly the petitioner, for himself, his heirs, executors, administrators, and assigns, thereby covenanted with the said bankrupt, his heirs, executors, and administrators, that in case the said bankrupt should be desirous of repurchasing the said annuity, or any part thereof, not being less at any one time than 132*l.* 2*s.* per annum, and of such his intention should give the petitioner, his executors, administrators, or assigns, six calendar months' notice in writing, the petitioner, his executors, administrators, or assigns would, on receiving from the said bankrupt, all sums of money which should be then due for arrears of the said annuity, or so much of the said annuity as should not have been previously repurchased, and also a proportional part thereof, from the last quarterly day preceding the repurchase, accept the sum of 7,000*l.*, as in full, for the repurchase of the said annuity of 92*l.* 14*s.*, or otherwise accept the sum of 1,000*l.* as in full for the repurchase of 132*l.* 2*s.* per annum, part of the said annuity, and so in proportion for any larger part or proportion thereof, and upon receipt of the repurchase-money, for any such part or parts of the said annuity, the petitioner, his executors, administrators, or assigns, would execute such proper and reasonable assignments of such part or parts of the said annuity as should be so repurchased unto the said bankrupt; and upon receipt of the whole of the money for the repurchase of the said annuity, and of all arrears thereof, it was agreed that the petitioner, his executors, administrators, or assigns, should and would at the request, costs, and charges of the said bankrupt, release or assign the said annuity or clear yearly sum of 92*l.* 14*s.*, unto the said bankrupt, and do every other act, deed, or thing necessary or advisable for the releasing and discharging the said annuity; and also for conveying, assigning,

and assuring unto the said bankrupt, his executors, administrators, or assigns, any policy or policies of assurance, which he or they should or might have effected on the life of the said bankrupt, and which should be then subsisting, and on foot. The petition then went on to state, that the petitioner did, at his own costs and expenses, effect two policies of assurance on the life of the bankrupt, amounting together to 7,000*l.*; and that he had paid the annual premiums thereon, namely, 294*l.* 14*s.* 2*d.*, out of his own proper monies: that on the 9th of December 1838, the annuity being in arrear for six months, the petitioner demanded payment thereof, when the bankrupt prevailed upon him to take his promissory note for the amount, at three months' date: that this note was dishonoured when at maturity, and then, there being three-fourths of a year arrears, the petitioner threatened to issue execution upon the said judgment, if the arrears were not immediately paid up: that the bankrupt, to prevent the execution issuing, did, on the 14th of March 1839, deposit the lease of a house in Clifford Street, as a security for the payment of the arrears, he at that time promising to pay up the arrears in a few days. It appeared that the bankrupt failed in this promise, and on the 3rd of April 1839, the petitioner caused a writ of *fi. fa.* to be issued against the bankrupt, but that he forbore to execute the writ upon an arrangement, which is immaterial to the present question. On the 26th of April, a fiat issued against the bankrupt, and then it appeared that an act of bankruptcy had been committed, unknown to the petitioner, on the 1st of March 1839, the deposit having been made on the 14th. The questions were, first, in what manner the annuity was to be valued; namely, whether, upon the fair construction of the deed, it ought to be considered as an annuity for 924*l.* 14*s.*, or only for that sum, minus the sum of 294*l.* 14*s.* 2*d.*, the amount of annual premiums paid upon the two policies. Secondly, whether the petitioner, or the assignees of the bankrupt, were entitled to the two policies. And lastly, as to the validity of the petitioner's lien on the lease of the bankrupt's house, which had been deposited with him as a security for the

arrears of the annuity, which were due prior to the issuing of the fiat. As to the last point, the Court, upon a former petition by the petitioner, claiming his lien thereon, and which was heard upon the 29th of January 1840,—held, that the petitioner was not entitled to any lien thereon, in consequence of the secret act of bankruptcy which had been committed prior to the deposit; so that, so far as the last question was concerned, this was a petition for a rehearing. The petitioner tendered his proof before the commissioners, for the value of the annuity of 924*l.* 14*s.*, claiming at the same time to retain the two policies. The commissioners held, that he was entitled to retain the two policies, but that the annuity should not be valued at the full amount of 924*l.* 14*s.*, but that sum, minus the yearly premium of 294*l.* 14*s.* 2*d.* From this latter part of the decision of the commissioners, the petitioner now appealed.

Mr. Swanston and *Mr. Keene*, for the petitioner.—The Court decided against the petitioner's lien upon the lease, when this question was before the Court, and upon this point a rehearing is asked for. One particular view of the question was not at that time brought before the Court, namely, whether this deposit of the lease was not within the protection of the 2 & 3 Vict. c. 29, by which all *bond fide* transactions with a bankrupt are protected against a prior act of bankruptcy, of which the party so dealing had no notice: that act says, "that all contracts, dealings and transactions, by and with any bankrupt, really and *bond fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, had not notice of any prior act of bankruptcy by him committed." Now, here the deposit was made upon the 14th of March, the secret act of bankruptcy is said to have been committed on the 1st of March, on the 26th of April the fiat issued, on the 13th of May the assignees were chosen, and on the 19th of July the

act passed. It is not pretended that the petitioner had notice of the act of bankruptcy; he is therefore within the protection of the statute, which has been held to be retrospective. In *Luckin v. Simpson* (1), where the appointment of assignees must have been before the passing of the act, the Court of Common Pleas decided, that the statute had a retrospective operation, so as to protect an execution issued by a creditor, without notice of the act of bankruptcy. In *Edmonds v. Lawley* (2), an act of bankruptcy had been committed on the 6th of July, a *bond fide* execution issued on the 8th, under which the goods of the bankrupt were levied, and on the 19th of the same month the 2 & 3 Vict. c. 29. received the royal assent; on the 24th a fiat issued: and the Court held, that the execution was protected by the statute. Here the statute came in between the act of bankruptcy and the fiat. Parke, B. in giving judgment said, "If in this case a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act, so as to defeat that right. Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it, so as not to defeat the right of the assignees. But with respect to all fiats issued after the new act has come into operation, we think there is no injustice in saying, that the assignees must take the property subject to the new law." The case of *Luckin v. Simpson* was not cited in that case, for, though it had been argued, judgment had not been given until after *Edmonds v. Lawley*. In *Nelstrop v. Scarisbrick* (3), in which *Luckin v. Simpson* was cited with approbation, the fiat had issued prior to the passing of the act. Lord Abinger, C.B. in giving judgment (p. 687.) says, "I am of opinion, that the proper construction of this act is, that in all cases where the execution creditor *bond fide* issues and levies his execution, and a sale

of the goods takes place, before any of the proceedings in bankruptcy, that execution and sale are not to be prejudiced, by a previous act of bankruptcy, of which he had no notice;" so that *Luckin v. Simpson* was followed in that case, and is extended by it to cases where all the circumstances of act of bankruptcy, fiat, and choice of assignees, were before the statute. As to the question of the value of the annuity, we submit, that from the terms of the deed it is plain that it was perfectly optional with the petitioner, whether he would effect assurances or not. The grantor covenanted, that he would attend personally, in order to enable the petitioner, if he should think fit, to insure his life, &c.

[SIR J. CROSS.—I have a doubt, whether there was not an implied covenant in the deed for the grantor to insure, because it gives the grantor an interest in the policies.]

If the petitioner had not effected any insurance, could it be pretended, that he could not have proved for the full amount of the annuity? If it was to have been obligatory upon him, would there not have been a covenant to that effect? We therefore submit, that the petitioner, having effected these insurances at his own risk and cost, was entitled to hold them for his own benefit, unless the annuity should be redeemed in the manner stipulated in the deed, and is therefore entitled to prove for the full amount of the annuity, without giving up the policies to the assignees.

Mr. J. Russell and *Mr. Bacon*, contra. —The lease having been deposited subsequent to the act of bankruptcy, and therefore void as against the assignees, who were appointed prior to the passing of the act of Victoria, there was, at the time of that act passing, a vested interest in the assignees in respect of that lease, which could not have been divested by that act. In *Edmonds v. Lawley*, Parke, B., after remarking that the words of the act were very general, put the case of assignees having been chosen before the passing of the act, and said, that the assignees would have had a vested right to the property of the bankrupt, and that it would be unjust to construe the act so as to defeat that right—here that right was vested in the assignees prior to the act. *Nelstrop v. Scarisbrick* was a case where the fiat issued

(1) 4 Bing. N.C. 353.

(2) 6 Mee. & Wels. 285; n.c. 9 Law J. Rep. (n.s.) Exch. 143.

(3) Ibid. 684; s.c. 9 Law J. Rep. (n.s.) Exch. 229.

before the passing of the act, but the assignees were not chosen until after; so that there the property was not vested in the assignees at the passing of the act. In the case of *Luckin v. Simpson*, *Edmonds v. Lawley* was not cited, but the Judges of the Common Pleas seem to have proceeded by analogy to the 82nd section of the Bankrupt Act, and held, that the 2 & 3 Vict. c. 29. had also a retrospective operation. But we submit, that the words are very different in the two acts; in the latter there are words of futurity only, but in the former there are the words "made or which shall hereafter be made." As to the valuation of the annuity, taking the whole transaction together, and considering that the grantor was paying 9l. per cent., and that he had the option of having the policies assigned to him, the fair construction of the deed is, that the premiums were to be paid out of the annuity: it follows, therefore, that the assignees are entitled to the policies, as the bankrupt would have been, if he had redeemed the annuity.

Mr. Swanston, in reply.—There is no doubt that it has been decided, that the act is retrospective. The case in the Common Pleas (*Luckin v. Simpson*) was, in all its circumstances, the same as the present, and is a direct authority for the petitioner.

[*SIR J. CROSS*.—No doubt of it; unless the attention of the Court was not drawn to the circumstance of the right being vested in the assignees at the passing of the act.]

That distinction was taken in *Nelstrop v. Scarisbrick*, by *Mr. Wightman*, and in *Luckin v. Simpson* Lord Chief Justice Tindal referred to two cases—*Churchill v. Crease* (4), *Terrington v. Hargreaves* (5).

March 17.—*SIR J. CROSS*.—Some years ago the petitioner in this case purchased an annuity of 924l. 14s. for the price of 7,000l., and by law he is entitled to be admitted to prove for the present value of the annuity, regard being had to the price paid, and the lapse of time from the grant thereof to the date of the commission; he has since effected assurances upon the life of the

grantor for 7000l., and pays for such assurances the annual sum of 294l.; he went before the commissioners to prove his claim in respect of the annuity, which was valued at the amount of 6,090l. by an accountant; but it was objected to that proof, that instead of the annuity being valued at its full amount, it should be valued at its amount, minus the annual premiums in respect of the assurances; and the commissioners adopted this view of the matter, and admitted the petitioner as a creditor only for the sum of 4,383l. The petitioner complains of that rejection, and the question is, whether the commissioners have done right in deducting from the amount of the annuity the premiums for assurances; and this depends upon another question, namely, whether by the true construction of the deed, the annuitant was bound to assure for the contingent benefit of the grantor, as well as for his own. I have carefully perused the annuity deed, and I find that the grantor is entitled at any time to redeem the whole or any part of the annuity not being a less part than one-seventh of the whole; and the deed provided, that if the annuitant should think fit to assure, the grantor would attend at the offices, and do all acts that should be necessary to enable the grantee to effect the assurances; and also that he would pay any additional premiums, which should be rendered necessary by any act of his, such as his going abroad, &c. It was also agreed, on the part of the grantee, that if the grantor should redeem the whole of the annuity, then he should be entitled to the policies of assurance, and all benefits arising from them. This latter clause led me to doubt, whether it was optional with the annuitant to assure or not; but I think, that upon the whole meaning of the deed, it was optional with him: the effect of a contrary construction would be this—suppose the grantor should think fit to redeem all but one-seventh, which he might have done, the annuity would be reduced to 132l. 2s., and yet the annuitant would have to pay 294l. to the assurance office for the benefit of the grantor: that could not be a proper construction. If then it was optional, and he thought fit to assure, what has been the effect of the assurance on proof? If he had

(4) 5 Bing. 177; s. c. 7 Law J. Rep. C.P. 63.

(5) Ibid. 489; s. c. Ibid. 207.

not assured at all, he would have been admitted for the whole of his proof, but then he would have had an ineffectual security for the sum paid; but, if he assured, and that was to affect his proof, then the other creditors would be the parties benefited by the assurance. It appears to me therefore, that, upon this reasoning, the creditor is entitled to his proof, to the extent of the full value of the annuity, without any deduction. As to the question arising upon the construction of the act with respect to the deposit of the lease, the Court of Exchequer have lately decided against the petitioner's claim. In the case to which I allude, *Moore v. Phillips* (6), the Court held, that the act was not retrospective, and did not defeat the right of the assignees, who had been appointed before the passing of the act. Lord Abinger, C.B. stated, that he had spoken to the Chief Justice of the Common Pleas upon the case of *Luckin v. Simpson*, and that his Lordship admitted, that in that case the attention of the Court had not been drawn to the circumstance of the assignees having been appointed before the passing of the act. I am therefore of opinion, that the petitioner's case fails, so far as concerns the deposit of the lease.

Ordered—that the petitioner be at liberty to prove for the full value of the annuity, without deducting the yearly premiums, and without giving up the policies.

Petition dismissed, so far as regards the deposit of the lease.

1841. { *Ex parte* GEORGE FARLEY
April 20, 24. { AND OTHERS in re H. A.
NEW, A BANKRUPT.

Banker — Deposit — Equitable Mortgage.

Title-deeds were originally deposited with bankers for safe custody, the property comprised in which belonged to two brothers as joint tenants; one of the joint tenants over-drew his banking account, and said, that the deeds should be a security for any advances the bank had made, or should make; a par-

tition of the property afterwards took place, and the deeds relating to the property taken in severalty by the debtor were separated from the others, and placed by the bankers amongst their other securities; but the deed of partition was not deposited with them. The debtor then gave a memorandum, that the deeds were to remain a security "for any advances you may make on my account:"—Held, that the bankers were equitable mortgagees, notwithstanding that the original deposit was for safe custody, and that the last title-deed (the partition deed) had not been deposited:—Held, also, that the expression in the memorandum, "for any advances you may make on my account," did not confine the security to subsequent advances.

This was the petition of certain bankers carrying on business at Worcester, and the object of it was to obtain an order, declaring them equitable mortgagees by deposit, with a written memorandum, of certain estates, for the balance to be found due from the bankrupt upon his banking account with them. The petitioners claimed to be equitable mortgagees, by deposit of title-deeds with a written memorandum, for the balance of their banking account with the bankrupt.

The bankrupt was entitled, under the will of his father, to certain property jointly with his brother. Shortly after the death of the father, which took place in the year 1827, the title-deeds of the property were brought by one of the trustees of the will to the banking house (the other co-trustee being a member of the banking house) and deposited with the petitioners, for safe custody, in a tin-box, marked "New's Trust." The bankrupt, some time after that, commenced business as a grocer, and opened a regular banking account with the petitioners.

It appeared that in December 1839 a balance was struck between the bankrupt and the petitioners, when it appeared that the bankrupt had overdrawn his account to the amount of 1,900*l.* The petition stated, that at the time when the bankrupt began to overdraw his account, and on different occasions afterwards, the bankrupt represented to the petitioners that if they would honour his cheques and drafts, he

(6) 7 Mee. & Wels. 536; s. c. 10 Law J. Rep. (N.S.) Exch. 129.

would give them a security on his property for the monies which they had advanced and might further advance on his account; and that they might hold the said title deeds, so far as they related to the interest of him, the bankrupt, as a security for his account; that in May, 1840, upon the petitioners pressing for a security for the balance, which then amounted to \$,000, the bankrupt stated that a deed of partition between him and his brother of the property comprised in the said title deeds, was in preparation by Mr. Gillam, the solicitor of the trustees, and that when that was executed, he would give an effective mortgage security, for the balance due or to become due to the petitioners upon the property to be conveyed to him in severalty. Shortly after the bankrupt wrote and sent the following letter to the petitioners:—
 "Messrs. Farley & Co. Gentlmen. The reason I have not called upon you for this, touching my accounts, I have twice expressed to your clerk, who has seen me upon the subject, namely, my inability at present to take up the joint note lying in your hands for \$,000. As far as arrangements for security are concerned, I have done every thing in my power to have them completed: the drafts have been prepared two months since, and have (under Messrs. Evans & Owen's, the two trustees' instructions) been left with Mr. Gillam. I have seen that gentleman repeatedly on the subject, and although he says they require little or no alteration, I cannot obtain them from him. It is my anxious wish that things should be arranged, and that you should hold the deeds of my property, as security for your account but, as I before stated, I cannot succeed in directing Mr. Gillam's attention to the subject. But for this unpardonable neglect, the affairs would have been settled long since. As far as regards the accounts lying dead, I imagined from what passed between my brother and Mr. Weale, that it was your wish that it should be so. If, however, you feel disposed to continue it, I will take care it shall not be increased, and as soon as the trustee's solicitor, Mr. Gillam, will prepare the necessary deeds, that moment I am prepared to give you security for the full amount of your account."

It appeared that a few days after the

date of this letter, the deed of partition was executed, whereby the property upon which the petitioners claim to be equitable mortgagees, was conveyed in severalty to the bankrupt; but the deed of partition was not deposited with the petitioners. That shortly after the execution of that deed, the bankrupt, at the request of the petitioners, signed the following memorandum:—
 "Worcester, September 28, 1840, Messrs. Farley & Co. Gentlmen. I herewith deposit with you sundry deeds of my freehold property, as under, which you will hold as a collateral security for any advances you may make on my account." This was followed by a schedule of deeds relating to the property in question, all of which were then in the possession of the petitioners for safe custody but not including the deed of partition.

It appeared that immediately after the memorandum the title deeds which related to the bankrupt's moiety were separated from the others, and placed by the bankers in the usual place for keeping their securities.

Between the date of this memorandum and the 4th of December following, the petitioners advanced the further sum of 1,687, to the bankrupt, and on the 8th of January, 1841, a fiat issued against the bankrupt. The petitioners now claimed to be equitable mortgagees for the whole amount of their debt.

The questions were, first, whether the deeds, having been originally deposited with the petitioners for safe custody, the subsequent transactions amounted to a deposit, so as to make the depositors equitable mortgagees of the premises; secondly, whether the petitioners, as equitable mortgagees, were as such, the last deed, not having been deposited with them (namely, the deed of partition); and lastly, whether, if so, the security was intended to be for the whole debt which should be due from the bankrupt or merely for advances subsequent to the memorandum of deposit of the 28th of September 1840.

Mr. Swenson and Mr. Wood, in support of the petition. Without looking to the letter of the bankrupt and the memorandum of deposit, afterwards signed, the petitioners would have had something more than a mere verbal agreement, for it

would have been an agreement accompanied by an act. The question in that state of things would have been, whether that would have satisfied the provisions of the Statute of Frauds. Lord Eldon has, in cases of equitable mortgage extended the original object of the deposit upon very slight grounds: see

Ex parte Kensington, 2 Ves. & B. 79.

Ex parte Lloyd, 1 Glyn & Jam. 389.

But if the Court cannot extend the object of the deposit by the verbal agreement, which was, that the deeds should remain a security for the advances then made and thereafter to be made, still the bankrupt's letter, and subsequently the memorandum, must be abundant evidence that the deeds were to remain a security for the entire account; and they cannot have the effect of limiting the security to subsequent advances.

Mr. Bethell and *Mr. Anderdon*, for the assignees.—The doctrine of equitable mortgage is not to be extended with reference to the Statute of Frauds; and the Court of Review has refused to act, unless in a very clear case. Now in the present case the possession of the title-deeds is to be accounted for otherwise than by contract. Title-deeds belong to the person having the legal estate, and John Owen (one of the petitioners) was a trustee of the legal estate, and had these deeds, which were kept by him in a box, with the words "New's Trust." The lien of the petitioners must therefore depend upon the two next grounds put forward by the petitioners, namely, the letter of June 1840, and the memorandum of September. Now this letter does not shew an intention in the writer to give an immediate mortgage: the whole tenour of it is prospective; in it the bankrupt says, "it is my anxious wish that things *should* be arranged, and that you *should* hold the deeds of my property, as a security," &c. At the very date of the letter there was an agreement for a partition of the property, therefore some of those deeds might have belonged to his brother, as relating to property to be taken by him in severalty. Then the memorandum of September is in so many words confined to subsequent advances. Therefore the debt then due cannot be looked upon as secured by the deposit, supposing that the effect of

this letter or memorandum was to alter the nature of the petitioners' possession of the title-deeds. But moreover it is submitted that the last title-deed (the partition deed) not having been deposited, the equitable title of the petitioners is incomplete. If a party deposit some of his title-deeds, by way of a security, the depositor cannot file his bill to have the rest of them delivered up, upon the ground that it was the depositor's intent to deposit the whole of them.

The following cases were cited:—

Norris v. Wilkinson, 12 Ves. 192.

Ex parte Hooper, 1 Mer. 9.

Ex parte Bulleel, 2 Cox, 243.

SIR JOHN CROSS.—The petitioners are bankers at Worcester, and they come here claiming an equitable mortgage upon certain estates for 3,600*l.*, to secure which the bankrupt gave them the memorandum of September 1840, with the schedule explaining the property which was intended to be for their security. The deeds referred to were those in the possession of the bankers, for safe custody. Several objections were raised, on the part of the assignees, to the validity of the security and to the extent of it: first, because the deeds come to the possession of the petitioners for a different purpose than for the security of the petitioners; secondly, because the last deed under which the bankrupt derived his title, was not among them; thirdly, that the equitable mortgage was a security for and expressly confined to subsequent advances. From the evidence, it appears that the property was given by the will of the bankrupt's father to two trustees, upon trust, to raise certain sums of money for his wife and daughters, and, subject thereto, to convey the estates to the bankrupt and his brother: that all the title-deeds and other documents were placed in a box, upon which was written "New's Trust," which box was deposited with the bankers for safe custody. The bankrupt kept a running account with the bankers, and, upon his overdrawing his account to a large amount, they applied to him for a security for their advances, and the bankrupt stated that a deed of partition was in preparation, which, upon being completed, should be for their security, and said, "It is my anxious wish that you

Ordered as prayed.

(S) 11 Feb. 401.

[illegible]

(1) Mont. & Chit. 445; a. c. 3 Dec. 405; 8
Law J. Rep. (N.S.) Bankr. 5.

(2) Ibid. 590; s.c. 9 Law J. Rep. (N.S.) Bankr. 14.

upon a debt arising out of accounts, which have not been settled, and that would be an adjustment of the accounts?

[SIR J. CROSS.—I think the real question here is, whether by force of the act of parliament, the company could not have, independent of the bankruptcy, maintained their action at law? If so, they could not cover against the effects of the bankruptcy.]

Nothing is more familiar than the cases where, though the party may bring his action, still he may not be at liberty to prove: as in the case of a creditor having a security for his debt, where he may bring his action, though he could not prove without giving up the security. The statute of 1836, *Vict. c. 96*, was intended to take effect only between the partners themselves, and between the partners and other creditors. The object of the act was to prevent the mischief which arose, where an ascertained debt could not be recovered by the company from individual members of it; and this was perfectly just; but where other creditors come in, then the settled rule prevents the company from taking advantage of the act. *Ex parte Shaw* is as strong a case as possible, against the proof claimed. (*Ex parte Shaw v. Ramsford* (3), it was held, that money due for rents in respect of shares in a joint-stock bank, did not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder, without an account first taken—*Ex parte Wood* (4), and *Ex parte Young* (5); and on each branch, by Mr. Anderson, in reply. In *Ex parte Shaw v. Ramsford*, the question arose in respect of a bill; the company was insolvent, and at the time that the bill was made, the company might have been a large debtor to the bankrupt's estate, when it would have been a most unjust thing to have admitted the proof. The 1 & 2 *Vict. c. 96*, in effect strikes the partner out of the partnership, for all intents and purposes, so far as actions and suits by the company against such partner are concerned.

[SIR J. CROSS.—There is no question but that the debt of the partner, arising

out of the law of 1836, which is the balance of the banking account, is by the act of parliament made a legal debt. And the objections raised to the proof resolve themselves into these: First, that although the act of parliament has given a right of action, and consequently constituted it a legal debt, yet that the legislature only has intended that should be the case as between the bank and its partners; but that it was not intended to give the company such rights in competition with their other creditors in matters of bankruptcy. But we must recollect that a banking company has dealings with its partners in two relations—as partners, and also as customers. There is no such double relation in ordinary partnerships; therefore it is not inconsistent with general principles that the legislature should have intended that the company should have rights as against the partner, in his character of customer, without regard to his partnership character. The objection is also taken, that the company must not come in competition with their own creditors in this bankruptcy; but that it is quite clear that the assignees who appear to represent the creditors of the bankrupt have no right to appear as the separate creditors, to resist the proof; therefore the assignees only appear as representing those who may be considered as the joint creditors of the bankrupt. At present there are no joint creditors upon the proceedings; but what is the situation of the joint creditors in their relation to the bankrupt and to the banking company? The company consists probably of several hundred individuals; and whether the company be solvent or insolvent, there is no doubt but the creditors of the company, having the liability of each individual banker, may be considered perfectly safe. But I do not mention that as a reason, but only to shew that the legislature did not unreasonably give the company a right not only to prove against the partner, *qua* partner, but as against him in the relation of their customers. I am of opinion, that the legislature did consider that the company should be at liberty to charge the partner with a legal debt. My present impression is, that the petitioner is entitled to prove; but as it is a new question, the order had better not be drawn up for a

(3) *Mont. & Chit.* 607; s. c. 9 *Law J. Rep.* (N.S.) Bankr. 9.

(4) 1 *Mont. Dea. & D.* 92; s. c. 9 *Law J. Rep.* Bankr. 20.

(5) 2 *Rose*, 41.

least. I shall be obliged by your waiting the arrival of next mail; on its receipt, to dispose of my lot of blankets." To which

The petitioners accordingly, in compliance with the request in that letter, awaited the arrival of the next mail, but not being able then to dispose of them, except at a loss, they wrote to the bankrupt, informing him to that effect, and requiring instructions. — No answer was returned to this letter, and a writ issued against the bankrupt on the 27th of January 1841.

Mr. Bacon, for the petitioners. — When payment for the fifty chests was demanded, the bankrupt paid 100*l.* on account, leaving the warrants in the hands of the petitioners as a security for the balance due. The teas were therefore clearly a pledge; but the letter of the 4th of December 1841, contains an express contract, and an authority to the petitioners to sell the teas for the bankrupt.

Mr. Rolfe, for the assignees. — First, this is not the case of a creditor having a pledge of goods for the amount of his debt, but merely the case of a vendor of goods retaining the possession of the goods sold, in default of payment of the purchase-money. The only way in which this could be made out a pledge, would be by shewing a contract that these goods should remain as a pledge; but there is no such contract. Neither the original purchase (for, by that it appears, that the goods were to have been delivered immediately upon credit), nor the invoice, nor the letter of the 7th of May, nor the declaration said to have been made to Dadds, and the payment of the 100*l.*, creates any contract sufficient to make the goods a pledge for the amount agreed to be paid. The only effect of the payment of the 100*l.* was to leave the goods in the hands of the petitioners for the reduced debt, in the same manner as they were for the whole debt. Then, came the letter of the 4th of December; but this does not contain any contract. Then what would have been the rights of the petitioners had not bankruptcy intervened? Merely an action for damages on breach of the contract; but in bankruptcy, a petitioners could not prove for the amount of damages. In *Green v. Biaknell* (1), the

(1) 5 Ad. & EL 701; 6. c. 71 Law J. Rep. (N.B.) Q.B. 272.

Court held that damages could not be proved, although the amount was ascertained.

Sir J. Cross. — There the bankrupt had refused to accept the goods, and, before the bankruptcy, it was a question of damages only; to ascertain what they were, supposing that the petitioners are entitled to the prayer of their petition, then I submit, that this position was unnecessary, for they might have sold without coming here. In *Lea v. Geller* (2), it was contended, that the creditor should have gone to the commissioners for leave to sell the pledge; but the Vice-Chancellor held, that the selling of the pledge, without applying to the commissioners, did not prevent the admission of proof for the difference.

Sir J. Cross. — All that case shews is, that there was no fault found with the sale; but the parties proceeded to the sale at their own risk.

Mr. Bacon was stopped in reply.

Sir J. Cross. — In this case, there has been no breach of contract; both parties have dealt, as in a subsisting contract; first, then, came the order for the goods; that made it a case of goods bought and sold, to be paid for at a future day; and if it had stopped there, it would have been a very different case; but it appears, that after the time for payment had expired, the bankrupt was called upon for payment, and then, he said, "you may retain the warrants in your hands as a security for the remainder of the account." There was, therefore, a clear agreement, that the teas were to remain as a security for the balance of account; and I am of opinion, that the petitioners are entitled to the prayer of their petition. As to the observation, that this petition was unnecessary, and that the petitioners might have proceeded to a sale, I think they could not have done so without incurring some risk; — they had no right to sell the goods of the bankrupt, or of the assignees, without the order of this Court.

Mr. Bacon applied for the petitioners' costs out of the estate, there being, as he submitted, sufficient written evidence of

given by the bankrupt to William Latham, to accept the bills in his own name and then went to show that the admissions which the bankrupt made, after the bills had been dishonoured, were made for the purpose of screening his brother, to dis- blackwash in his affidavits, &c., that he had not used any threat to induce the bankrupt, for making the acknowledgments which he had.

The question was, whether that written acknowledgment, by the bankrupt, after the bills had been dishonoured, as to his responsibility, thereon, was sufficient to make him liable upon them, so that the holders would have a good petitioning creditor's debt. *Mr. Anderson*, in support of the petition.

This was not an acknowledgment by the bankrupt, that he was the acceptor of the bills, by procuration, or in other words, that he had given William Latham authority to sign his name; but only an undertaking to become a surety for the payment of the bills. (The words, "and also engage to provide for and pay them, in case my brother should fail to do so.") Every acknowledgment to pay the debt of another person, must be not only in writing, but must be given for a consideration. *James v. Williams* (1). Where the original indorsement of a payee's name on a bill of exchange is a forgery, a real indorsement by the payee after the bill has arrived at maturity, cannot give the holder any title. *Esdaile v. La Nauze* (2).

Mr. Swanton and Mr. K. S. Parker, contra. The evidence in this case goes to show, that it was, by no means, uncommon for William Latham to accept bills in the name and with the permission of the bankrupt; and, therefore, there must be considerable doubt whether, in this instance, the acceptances were forgeries; but, in *Esdaile v. La Nauze*, there was not a shadow of a doubt, but that the original acceptance was a forgery.

SIR JOHN CROSS.—The petitioning creditors in this case undertook to prove that the bills in question were accepted by the

bankrupt, either by his own hand, or by his authority. It is admitted, that the bills are not under his own hand, but it is contended, that they were accepted by his authority; and the question is, whether the authority was given previously to the acceptance or not, for a subsequent acknowledgment could not make it good; so that the only question is, whether there was an antecedent authority. The petitioning creditor has not produced the bills in question, so that we do not know when they became due, or when they were presented for payment, or anything about them, but the affidavit only states that they were presented for payment, and dishonoured, and that all I can know is, that John Latham ought to have been the person to whom, in the common course of things, they should have been presented; but perhaps, they were made payable to some banker and a banker, if they were dishonoured by John Latham, the nominal acceptor, when first they were presented, it would have been clear that he did not because they were not his acceptances. It seems to me, extraordinary, and not very prudent conduct on the part of the holders of bills to so large an amount, as these in question, that they should not have had personal communication with the surety, but were satisfied with the bare acceptance.

We are left to collect that there was an antecedent authority, from what passed between Brommell and John Latham. Now, it is not immaterial to recollect, that at the time when Brommell went to call on John Latham, he was informed that his brother, William Latham, was in custody for forgery. Brommell states that he used no threat, in his conversation with John Latham, to induce him to acknowledge the bills; but, no doubt, the substance of the conversation was, that the brother was in custody. Well then, what passed between these two persons? Brommell's testimony as to what passed, is at variance with the written acknowledgment, for he states that John Latham acknowledged to have authorized William Latham to accept these bills; but the written memorandum states—[His Honour here read the memorandum.] Why, that is just what a man might do who had given no authority; for all he would have to do, would have been

(1) 5 B. & Ad. 1109; 5 C. 3 Law J. Rep. (N.S.) K.B. 97.

(2) 1 You. & Col. 394; 2 C. 4 Law J. Rep. (N.S.) Exch. Eq. 46.

to have stated that the acceptances were made by his authority. It appears to me, therefore, that the bills were not accepted by the bankrupt; and next, that there was no authority to the signer of these acceptances, previous to the signature; and that, therefore, there is no good petitioning creditor's debt; and that the prayer of the petition must be granted, at the costs of the petitioning creditor.

Fiat superseded at the cost of the petitioning creditor.

1841. { *Ex parte* CHADWICK AND
June 7. { OTHERS *in re* BELL, A. BANK-
RUPT.

Practice.—Taxation of Solicitor's Bill up to Choice of Assignees.

Objected, that the petitioning creditor should be served with the assignee's petition, to tax the solicitor's bill up to the choice of assignees:—Held, that the bill should be referred for taxation, the petitioning creditor to have notice of the order, with liberty to attend and leave to apply.

Per Curiam—It would be better in future that the petitioning creditor should either join in the petition, or be served with it. Sed quære, et vide Barlow v. Biass, before the Vice Chancellor, 2nd of December 1829.

This was a petition by the assignees, to have the bill of costs of the solicitor, up to the choice of assignees, referred for taxation. The petitioning creditor was not served; and the only question was, whether it was necessary to serve him or not.

Mr. Swanston, for the petition.

Mr. Anderdon, for the solicitor, contra.

—The petitioning creditor should be served with this petition, as he has an interest in having the bill of costs paid, he being liable to the solicitor in respect of it.

[*SIR JOHN CROSS.*—In *Ex parte Benson* (1), the solicitor presented a petition to compel the assignees to pay the bill. The objection was taken, on the part of the assignees, that the petitioning creditor, and not his solicitor, ought to have presented the petition; for *non constat*, that the solicitor might not already have been paid.

(1) 2 Mont. & Ayr. 582; s. c. 5 Law J. Rep. (N.S.) Bankr. 23.

I was of opinion, that the objection was good, but the rest of the Court decided differently.]

The question there was, whether the solicitor could substitute himself for the petitioning creditor, and by going against the assignees, without serving the petitioning creditor, thereby prevent him from going afterwards against the petitioning creditor.

[*SIR JOHN CROSS.*—If the solicitor has the right to present his petition for payment, have not the assignees the right, as against him, of having the bill taxed?]]

The only question is, how much of this bill is fairly chargeable against this estate? But then the question arises, whether the petitioning creditor has not a right to be here, as he may be liable to the payment of those items which shall be taxed off?

Mr. Swanston, in reply.

SIR JOHN CROSS.—My own opinion still is, that according to the law of the case, the petitioning creditor ought to be a party to the proceedings; but, in *Ex parte Benson*, I had the misfortune to differ from the rest of the Court, who held that the practice warranted the solicitor coming by himself, and without serving the petitioning creditor. Then, in the case of *Ex parte Moore re Cartwright* (2), there is a query in the margin, "whether a petition to tax the petitioning creditor's bill, need be served on him." The Court there, feeling that there was some difference between the law and the practice, made the usual order for taxation, "and that the petitioning creditor should have notice of the order, and liberty to apply," &c. As this petitioner may be understood to have come upon the authority of that case, I think I must make the same order that was made there. If the case were new, I should say that the petitioning creditor ought to be a party; and in future, it would be more advisable that the petitioning creditor should either join in the petition, or be served with it.

The usual order made as to taxation, and let the petitioning creditor have notice of this order; and let him be at liberty to attend the registrar; and let him have leave to apply to this Court if he thinks fit.

(2) 3 Mont. & Ayr. 699.

1841. *Ex parte Chitty in re Chitty*
April 17.) A BANKRUPT.

Superedeas—Surrender.

The Court will superedeas upon the application of the bankrupt, with the consent of all the creditors, although the bankrupt has not surrendered, he being abroad.

This was the petition of the bankrupt, presented by his solicitor, authorized thereto, and praying a superedeas, all the creditors consenting. The only question was, whether the order could be made, the bankrupt not having surrendered. The bankrupt was in America at the issuing of the fiat, and had remained there ever since.

Mr. James Russell, for the petition, cited

Ex parte Carlidge & Glynn, 1 Jan. 35.

Ex parte Peaker, Ibid. 337.

Ex parte Glynn, 1 Mont. 21.

Mr. K. S. Parker appeared for the creditors, and consented.

Sir J. Cross.—I never had any doubt, but that it was competent for the Court to make this order; but some of the Judges having mentioned a doubt upon the subject, it was right that cases should have been searched for. Take the order.

and no more.

1841. *Ex parte Corbett in re Ed-wards*, A BANKRUPT.

April 23.) *Equitable Mortgage—Costs.*

The first memorandum was "as security for the amount of the bill; the subsequent memorandum was "security for the amount of my account." Held, that the depositor was mortgagee for the balance of his general account, with memorandum in writing; and was entitled to his costs.

The only question in this case was, whether the petitioner, who was the registered officer of the North and South Wales Bank, should be declared equitable mortgagee by deposit, for the amount of a particular bill only, or for the balance of his general account; and whether he was entitled to the costs of this application, as being an equitable mortgagee by deposit,

NEW SERIES, X.—BANKR.

with memorandum in writing. The questions arose upon the two following letters of the bankrupt:—

"Liverpool, March 18, 1840.

"Dear Sir,—I have come to an understanding with the directors this morning, that a part of my bill is to be renewed again, in order to get the cash to make up the remainder. I think it necessary for me to have something to shew that the deeds are deposited in the North and South Wales Bank, therefore I shall feel obliged by your leaving me a note on your way to —, in the morning, acknowledging the receipt of the deeds as security for the amount of the bill; this is also Mr. Corbett's opinion. I shall be at home with the mail.

"I am, dear Sir, yours really,

"Ed. Edwards."

The bankrupt having made other applications to the bank for further accommodations, wrote the following letter to the petitioner:—

March 23, 1840.

"Sir,—On Saturday last, at Carnarvon,

I had a meeting of the gentlemen who join me in partnership, when it was resolved, that the arrangements for forming the partnership should be closed with as little delay as possible, and that Mr. Gladstone's offer and services be dispensed with, they finding the necessary capital amongst themselves. As the sum of £8,000, and upwards, (the price agreed to pay me for the establishment) will be paid into your hands in a few days, and your having ample security for this amount of my account, I feel justified in again craving your indulgence, and, under the circumstances, I trust my prayer may not be in vain.

"I am, Sir, yours respectfully,

"Ed. Edwards."

Mr. Cockerell, for the assignees, submitted that these letters did not form such an agreement as could be specifically performed; that there was nothing in writing which shewed that these deeds were deposited for any given amount; that there should be such an agreement as contained all the terms of the agreement; but that here, one letter spoke merely of the deeds as being a security for the bill, while the other spoke of the amount of the account; and insisted, that the petitioner should bear

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his own costs, as not being an equitable mortgagee, with memorandum in writing.

Mr. Dixon, for the petitioner.

SIR JOHN CROSS.—It seems to me, that the evidence is sufficient to entitle the petitioner to be declared an equitable mortgagee, with memorandum, for the balance of his general account. First, the deeds were deposited as a security for the amount of the bill; but the letter of the 23rd of March 1840, extends the security for the amount of the general account. I am of opinion, that the petitioner is entitled to the common order of an equitable mortgagee, with memorandum in writing.

Ordered accordingly.

1841. } *Ex parte OAKES in re OAKES*,
April 30. } A BANKRUPT.

Assignees, Petition by Bankrupt for new Choice of—Solicitor.

Petition by a bankrupt for a new choice of assignees, upon the ground that the administration of his estate was delayed, from the two assignees not agreeing together in the appointment of a solicitor, and the proceedings being impounded:—Held, that, it appearing to the Court that the bankrupt and one of the assignees were colluding in the petition, for the purpose of having a solicitor appointed, who had been already removed from being solicitor to the fiat, the bankrupt was not entitled to the prayer of his petition.

Semble, a bankrupt whose estate is not likely to pay 1s. in the pound may have a locus standi in a petition for a new choice of assignees.

A petition in this matter was reported some time back (see *Ex parte Randall in re Oakes* (1), upon the point whether the Court had jurisdiction to remove the solicitor to the fiat, upon the application of one assignee. The Court there removed the solicitor and impounded the proceedings. Since then the assignees had not been able to agree upon the appointment of a solicitor. Mr. Randall, one

of the assignees, offered to leave the appointment of one to any gentleman disinterested in the matter; but Mr. Beach, the other assignee, would not agree to this, and refused to name any solicitor but Mr. Watts, who had been already removed by the Court. The bankrupt himself was favourable to the appointment of Mr. Watts, and presented this petition for the purpose of obtaining an order for a new choice of assignees, upon the ground that the administration of his estate was at a stand-still for want of a solicitor, and owing to the disputes and differences of the assignees.

Mr. Swanston, in support of the petition.—The bankrupt is entitled to this relief: see *Ex parte Shaw* (2) and cases there cited. In *Jackson's case* (3) a new choice was ordered, and that order was affirmed when it came before Lord Eldon: see *Sir George Cooper's Reports*, 286.

Mr. Kenyon S. Parker, for Mr. Randall, one of the assignees, insisted that he had proceeded to sell and get in the estate as well as he was able; that this was not the petition of a party who had any interest in the matter, as the estate would not pay 1s. in the pound, and that therefore the bankrupt could not ask for a removal of the assignees.

[SIR J. CROSS.—I think the Court may entertain such a demand in a *bond fide* case.]

But the present is a plain case of collusion between the bankrupt and Beach, the other assignee, for the sole purpose of removing Randall, the other assignee, who has done everything that was fair. It is in evidence that Randall offered to leave the appointment of a solicitor to any gentleman who was disinterested in the question, but Beach refused that offer, and said that he would not agree to the appointment of any solicitor but Watts, the very person whom the Court has already removed from being solicitor to the fiat.

Mr. Price, for Mr. Beach, the other assignee, submitted to a re-choice of assignees, insisting that the proceedings were paralyzed as they at present were.

Mr. Swanston, in reply.

(2) 1 Glyn & Jam. 127.

(3) *Ibid.* 144.

(1) *Ante*, p. 29.

SIR J. CROSS.—It appears to me that this application has been got up for the sole purpose of opposing Mr. Randall, and that Mr. Beach, the other assignee, is colluding with the bankrupt, in support of the petition. I have stated, that it struck me that the best thing would be a new choice of assignees; the only thing that was decided by the Court before was, that it was proper to take the proceedings out of the hands of Mr. Watts, the solicitor whom Beach had employed (see *ante*). In that state of things the Court impounded the proceedings. Mr. Randall did what he ought; he proposed to Mr. Beach to leave it to any gentleman to appoint a solicitor; but Beach said that he would not agree to the appointment of any one but Watts, the very solicitor from whom the Court had taken the proceedings. Therefore, without saying that the Court would in any case refuse a bankrupt's petition for a new choice of assignees, upon the ground that there was not sufficient to pay 1s. in the pound, the Court cannot grant this petition. Mr. Beach, having been proved to refuse to appoint any solicitor but the one removed, is not entitled to any costs. Will Mr. Beach agree to the appointment of a solicitor by the commissioners?

Mr. Price, on the part of Beach, was not prepared to say.

Petition dismissed; Beach not to have his costs.

1841. }
May 22. } *In re FENTON ROBINSON.*

Dividend—Lost Proceedings.

A dividend declared amongst the creditors who had proved, and whose names were contained in a list produced, and amongst other creditors who should come in within a given time, where the proceedings in an old commission were lost.

Mr. Bacon applied, upon the affidavit of the surviving creditors' assignee, stating that search had been made for the proceedings, but that they could not be found, and that no proceedings had been taken on the commission since the year 1800: that a dividend of 5s. 6d. in the pound had

been paid, and a list of thirty-two creditors contained the names of all the creditors who had proved, with the amount of their claims: that some property had, by the vigilance of the official assignee, been discovered, but that the loss of the proceedings had rendered it necessary to issue a renewed fiat, for the purpose of reclaiming a dividend, but the commissioner did not like to make a dividend in the absence of the proceedings: that as to the list in question, there could be no doubt of its authenticity, and it was the best evidence they could give; the solicitor to the commission had been dead for upwards of twenty-five years, and his representative had made every search for the proceedings, but without success: that the list produced was found during a search, and was authenticated by the surviving assignee; he therefore applied for an order upon the commissioner to declare a dividend among the creditors contained in the list, or any other creditors who might come in and prove within a given time pursuant to advertisement.

Order—to the commissioner, to declare a dividend among the creditors contained in the list produced, and among such other creditors as should come in and prove within a given time.

1841. { *Ex parte THOMAS NETTLESHIP*
June 4. { *re JOHN BUSKILL, A BANKRUPT.*

Equitable Mortgage—Parol Evidence.

Equitable mortgage, by deposit of title-deeds, with memorandum in writing, to secure advances not exceeding a specified sum, extended by parol evidence to secure further advances.

This was the petition of one of the public officers of the Lincoln and Lindsey Banking Company; and the object of it was to obtain an order, declaring the banking company equitable mortgagees, by deposit of title-deeds, for the sum of 2,680*l.*, being the amount due upon the bankrupt's banking account. There was no question as to the title-deeds having been deposited as a security for 2,000*l.*; but the question

was, whether the amount for which the deeds were deposited as a security, and the memorandum in writing accompanying the deposit, was to be extended by parol beyond the 2,000*l*.

It appeared, that in December 1838, the bankrupt requested the Lincoln and Lindsey Banking Company to pay a balance of 1,870*l*. 11*s*., due from him to the Hull Banking Company, and to open an account with him. The company consented to do so, upon having that sum, and such further balance, not exceeding 2,000*l*., as should be due from him, secured by an equitable mortgage by deposit of the title-deeds in question. Accordingly, the title-deeds were deposited, and a memorandum in the following words, signed by the bankrupt:—

“Memorandum.—The undersigned John Buskill, of Louth, in the county of Lincoln, merchant, hath requested the Lincoln and Lindsey Banking Company to open an account with him, and to transact business for the said John Buskill; and the directors of the said company have agreed thereto, upon the terms nevertheless of the said John Buskill giving the trustees and directors of the said company for the time being a mortgage security of the several freehold estates, and also the leasehold warehouse, yard, and premises, the property of the said John Buskill, in Louth aforesaid, (the particulars whereof were then underwritten,) to the extent of 2,000*l*., for the securing to the said banking company as a changing and fluctuating body, all and every the sum and sums of money which the said company shall or may advance or pay, or become engaged or liable to pay for or on account of, or for the accommodation of the said John Buskill, his executors or administrators, either alone or jointly with any other person or persons, or in which the said John Buskill, his executors or administrators, either alone or jointly with any other person or persons, shall in any manner or upon any account become indebted to the said banking company.”

It appeared, that subsequently to the deposit, and on various occasions, the bankrupt requested the bank to make advances to him, exceeding the sum of 2,000*l*.; and in particular it appeared from the affidavit of John Nisbett, one of the clerks to the

banking company, that on the 20th of January 1840, the balance due from the bankrupt exceeded 2,400*l*., and that the bankrupt was then urgent for further accommodation. Deponent stated, that on that day, he waited upon the bankrupt, and had an interview with him, and upon such interview Buskill urged the granting of further accommodation, whereupon deponent remarked, that the security was limited to 2,000*l*., and that the bank was then under advances considerably exceeding that sum, but that, upon satisfactory security being given, the bank had no objection to make further advances; that Buskill thereupon urged that the bank held the title-deeds to all his estates in Louth, and he represented such estates to be then worth very much more than 2,000*l*., and added, “the directors have the security of all the property, and I require them to make me advances occasionally to their value, and if they make me further advances, the property shall be a security for such further advances,” or words to that effect. Upon this representation, it appeared that the bank made the required advances; and upon various occasions afterwards, it appeared that when the bankrupt required an advance beyond the sum of 2,000*l*., he stated to the bank, “Your account is covered; you have all my deeds and estates, and they are worth upwards of 2,500*l*.—my estates are a security to the bank,” or words to that effect. A fiat issued against the bankrupt, on the 25th of November 1840, at which time he was indebted to the bank, for advances made by them, in the amount of 2,680*l*. 1*d*. The bankrupt filed an affidavit in opposition, denying the truth of the statements alleged to have been made by him. The question was, whether the bank were entitled to be declared equitable mortgagees for the full amount, or merely for the 2,000*l*., as stated in the memorandum.

Mr. Swanston and *Mr. W. R. Ellis*, in support of the petition.

Mr. Anderdon, contra.—A written contract cannot be extended by parol.

The cases cited were—

Ex parte Langston, 17 Ves. 231.

Ex parte Kensington, 2 Ves. & Bea. 80.

Ex parte Marsh, 2 Rose, 239.

Ex parte Mountfort, 14 Ves. 606.

Ex parte Lloyd, 1 Glyn & Jam. 389.

sufficient to constitute the new firm equitable mortgagees.

SIR J. CROSS.—The first point is, that where there is a written agreement, that the deposit is to be for securing a particular advance, the security cannot be extended by parol. I am not aware of any such rule of law. Then, as to the Statute of Frauds: if the point had been new, it might have been open to discussion; but the cases cited have concluded the question. As to the facts, there is no doubt that the security was originally intended only to cover the advances to the amount of 2,000*l*. It would have been more satisfactory had there been a written memorandum when the security was subsequently extended. But then it is sworn, that on the 30th of January, the bankrupt stated, that the bank should hold the deeds as a security for all their future advances; and in his then circumstances, that statement is exceedingly probable. I am of opinion, that the evidence sufficiently establishes that there was a subsequent agreement, that the bankrupt's estate should be for the security of the advances beyond the 2,000*l*.

Common order for an equitable mortgage, without memorandum in writing.

1841. { *Ex parte H. J. OAKES AND*
July 14. { *OTHERS in re B. WORTERS,*
 { *A BANKRUPT.*

Equitable Mortgage—Partners.

The bankrupt, in 1830, deposited title-deeds with his bankers, to secure a floating balance. In 1836, one partner in the bank died, and a new partner was introduced. The title-deeds continued in the hands of the new firm, and the account with the bank went on in the same manner as before; and there was no recognition by the bankrupt, that the deposit was for the security of the new firm, until a short time prior to the bankruptcy, in February 1841:—Held, that the circumstances of the deposit continuing in the hands of the bankers, the account running on in the same way, and advances being made by the bank from 1826 to the bankruptcy, was

This was the petition of H. J. Oakes, R. Bevan, G. Moor, and W. R. Bevan, of Sudbury, in the county of Suffolk, bankers; and they claimed to be equitable mortgagees by deposit of title-deeds, for advances made by them to the bankrupt.

In May 1830, the bankrupt applied to the banking firm, which then consisted of the petitioners, H. J. Oakes, R. Bevan, G. Moor, and also of one D. Hanbury, since deceased, to advance him 100*l*., upon the security of the title-deeds in question. They accordingly made the advance, and the title-deeds were deposited as a security therefor, and for any sum or sums of money which might or should from time to time, or at any time thereafter, be advanced and lent by the said firm or co-partnership to the said bankrupt. David Hanbury died in August, 1836, and in November of the same year, the remaining co-partners took into partnership the petitioner W. R. Bevan.

The same course of dealing was continued between the bankrupt and the new firm, as had been between the bankrupt and the original firm, but there was no acknowledgment, on the part of the bankrupt, that the title-deeds were to continue as a deposit for the security of the new firm, in respect of advances made by them, except as appearing from the conversation referred to in the affidavits of James Brown and Benjamin Pratt, two clerks of the bank. James Brown stated, that when he last saw the bankrupt in the banking-house of the said firm of Oakes, Bevan & Co., at Sudbury aforesaid, namely, some time in or about the month of January last, the bankrupt then stood indebted to the said firm in the sum of 900*l*. and upwards, and that the said bankrupt then admitted and declared to the deponent, as he had on several occasions previously admitted, that the title-deeds and writings so deposited by him with the said firm, were intended as a security, and were a sufficient security for the amount due to them by the bankrupt, and would fully cover his, the bankrupt's, debt to the said bankers. Benjamin Pratt stated, that he called upon the bankrupt on or about the 13th of February last,

soon after the last sum was advanced by the said firm, and that he then saw the bankrupt and requested him to reduce his debt, if not by a greater payment, at all events by repaying the sum last advanced as aforesaid, as deponent feared the security was not of sufficient value for so large a debt, and that the bankrupt declined or refused to make any such repayment, and admitted and declared to deponent, that the deposit of the deeds and writings made by him was intended as a security, and was a sufficient security to the said firm of Oakes, Bevan & Co., for the whole debt, being the sum of 1,075*l.* 12*s.* and upwards, admitted by the said bankrupt to be due by him to the said firm of Oakes, Bevan, & Co.

On the 10th of February, an act of bankruptcy was committed, and on the 23rd, the fiat issued against the bankrupt. The conversation with Pratt, therefore, was subsequent to the act of bankruptcy; therefore, the whole question was, whether the circumstances appearing upon the affidavit of Brown, coupled with the circumstance of the deposit continuing for such a length of time in the hands of the petitioners, and the advances continuing to be made by them, as they were by the original firm, were sufficient to constitute the new firm equitable mortgagees.

Mr. Swanston, in support of the petition.

Mr. Stinton, contra.—Unless the petitioners can shew a direct recognition after the admission of the new partner, that the deposit was to continue as a security for the new firm, the petition must fail.

Ex parte Marsh, 2 Rose, 239.

Ex parte Lloyd, 1 Glyn & Jam. 389.

Ex parte Kensington, 2 Ves. & Bea. 80.

Mr. Swanston was stopped, in reply.

SIR J. CROSS.—This is a pure question of fact—namely, whether the advances made by the petitioners for the last six years were made upon the credit of the deposit, or upon the personal credit of the bankrupt. There is no doubt but the old firm held the deeds for their security; upon the change in the firm, the deeds continued in the hands of the petitioners, and the account continued in the same way as before, down to the time

of the bankruptcy, a period of six years. Why did the deeds remain in the hands of the petitioners? To get credit. It was contended, that nothing but an express recognition can suffice to continue the deposit for the benefit of the new firm; but I am clearly of opinion, that the fact of the deposit continuing for such a time in the hands of the new firm, and the bankrupt obtaining credit thereon, is of more importance than any bare recognition could have been. The advances were made upon the faith of the deposit; and under these circumstances, I am of opinion that the petitioners are entitled to the prayer of this petition.

Common order for an equitable mortgage, without written memorandum.

1841. } *Ex parte* FRANCIS WOODWARD
July 14. } *re* JAMES HARDY, A BANKRUPT.

Solicitor—Costs.

A solicitor, upon whose advice an act of bankruptcy was concerted, and an invalid fiat sued out,—Held, not entitled to his costs up to the choice of assignees.

The petitioner in this case was the solicitor to the fiat, and the object of it was to obtain an order on the assignee, who was also petitioning creditor, for payment of his bill of costs up to the choice of assignees. The question was, whether he was so entitled, the fiat having turned out to be altogether invalid, it having been sued out upon an act of bankruptcy concerted between the bankrupt, the petitioning creditor, and the solicitor, by the advice of the latter.

On the part of the petitioner, it was stated in evidence, that it was the general opinion of solicitors in his neighbourhood, that since the passing of the statute 1 & 2 Will. 4. c. 56, acts of bankruptcy might be concerted under the 42nd clause of that act, and that such was stated to be the law in a treatise of good repute, written by a barrister shortly after the passing of that act. That having been misled by that work, he had advised the concerted act of bankruptcy, but that this mistake could

not defeat his legal right to payment of his costs, the petitioning creditor having also concurred in all the acts which he now reprobated.

On the other hand, it was contended, that the fiat having been improperly sued out by the advice of the petitioner, and all the proceedings thereunder being null and void, there could be no right to charge the estate of the bankrupt with any costs incurred by such irregular proceedings; and that the solicitor, and not the petitioning creditor, should be at the loss.

Mr. Swanston and Mr. K. S. Parker, in support of the petition.

Mr. Bacon, contra.

SIR J. CROSS.—This is an application by a solicitor of this court, to require the Court to compel the assignee to pay the solicitor's bill up to the choice of assignees. On the part of the assignee this demand is resisted upon certain grounds. I would not have it supposed for a moment, that if a solicitor be employed by a person to sue out a fiat in bankruptcy, that when he comes for payment of his bill, the assignee should be allowed to take him by surprise, repudiating the fiat as invalid, and thereby defeat the solicitor's claim. But he does not come by surprise upon the solicitor, and repudiate the fiat; he shews, and the solicitor admits an extraordinary and absurd act of bankruptcy, concocted by his advice; and the whole of the proceedings founded upon that act of bankruptcy are useless. If the assignee should pay this petitioner's bill, he would not have any legal right to charge the bankrupt's estate therewith. The assignee could say to the petitioner, 'I am not liable to pay you out of the estate of the bankrupt, because, through your ill advice, the proceedings under the fiat are null and void.' He could not hold this language to a stranger, for he should hold to the fiat for better for worse; but here he shews gross misconduct on the part of the solicitor, in concerting the act of bankruptcy, and none of the circumstances are denied. It is clearly proved to my satisfaction, that this bankruptcy was altogether manufactured and contrived by the solicitor, and that he therefore is not entitled to enforce payment of his costs from the assignee. The

Court merely says, that the petitioner has not made out a good title to have the order prayed. He may try it by an action at law, if he please. It has been suggested, that there are other valid acts of bankruptcy, but I cannot take that upon mere statement. At present, all the Court knows is, that the act of bankruptcy upon which the fiat issued, was an invalid act of bankruptcy, and concerted by the petitioner. I am therefore of opinion, that this petition must be dismissed, with costs.

Petition dismissed, with costs.

1841. { *Ex parte* BURNETT *re* JAMES
July 30, 31. { HARDY, AN ALLEGED
BANKRUPT.

Solicitor—Costs of Supersedeas.

A supersedeas granted at the cost of the bankrupt, the petitioning creditor, and the solicitor to the fiat, the fiat having issued upon an act of bankruptcy concerted between the bankrupt, the petitioning creditor, and the solicitor.

This was a petition by a creditor of Hardy, and was presented in the same matter as the last case. The object of it was to have the fiat, which issued in 1838, superseded at the joint costs of Hardy (the alleged bankrupt,) W. the solicitor, and S. the petitioning creditor (who was also sole assignee). The ground for the supersedeas was, that the act of bankruptcy was concerted, and therefore the fiat invalid (see preceding case). There was no other act of bankruptcy which could be substituted. The invalidity of the fiat was only lately discovered.

Mr. Bacon, in support of the petition.

Mr. Anderdon and Mr. K. S. Parker, for the solicitor.—The fiat must be superseded, but then the solicitor is not to bear the expense. He advised according to the best of his ability, and was warranted in his advice by the treatise mentioned in the last case—

See *Ex parte Bostock re Whitehead*,
Mont. Dea. & De Gex, 344; s. c.
ante, p. 5.

Mr. Ellison, for the bankrupt, did not oppose the supersedeas, but contended, that his estate was not to bear the costs

incurred in consequence of the mistake of the solicitor, but that the solicitor was the party who should bear the blame and the costs of the supersedeas.

Mr. Swanston, for the petitioning creditor, who was also assignee, submitted, that the costs should be borne by the solicitor.

SIR J. CROSS.—There is no question but this was a concerted fiat, and ought to be superseded. All parties assent to this; and the only question between the parties is, as to the costs of the present petition. The whole was undoubtedly the contrivance of *Mr. W.* (the solicitor), and a very culpable contrivance it was; and, in my opinion, it was a mere conspiracy to defeat the execution creditor. A most singular contrivance it was: one would think it was done in jest. [His Honour then stated the concerted act of bankruptcy, which consisted in the petitioning creditor, who retired from the bankrupt's house, for the purpose of calling again, and being denied, calling a few minutes after for payment of a debt, and being denied accordingly.] It seems to me, that though *Mr. W.* was an adviser and prominent actor in the contrivance, yet that all the persons concerned in it are *in pari delicto*, and I cannot make any distinction between them. If I might do so, perhaps I might say, that *Mr. W.* was the most culpable. Then all I have to do is, to order that the fiat be superseded, with costs against the solicitor, the petitioning creditor, and the bankrupt, all alike.

Mr. Swanston asked, that the assignee might be indemnified by the solicitor; but the Court refused to make any such order, all the parties being *in pari delicto*.

1840. }
Nov. 21. } *Re BILLINGS.*

Fiat, where directed to a London Commissioner.

Mr. James Russell moved that the fiat in this matter should be directed to a London commissioner, instead of to the commissioner at Ipswich, at which place the bankrupt carried on his business. The majority of his creditors, both in number

and value, resided in London, Manchester, and Sheffield, none of his creditors residing in Ipswich. The witnesses to prove the trading and act of bankruptcy resided in London.

The Court made the order.

1840. }
Nov. 24. } *Re KAY.*

Practice.—Misdescription—Amendment.

Mr. James Russell moved in this matter for leave to amend the fiat, by substituting in the description of the bankrupt, the words "of New Brunswick," for the words "of Nova Scotia." The docket papers contained the same error as the fiat; the fiat had not been opened.

SIR G. ROSE.—You had better amend the docket papers, and alter the date of the fiat; but the safest way is to take a new fiat.

1841. }
April 27, 30. } *Ex parte GOODDY in re GOODDY, A BANKRUPT.*

Act of Bankruptcy—1 & 2 Vict. c. 110. s. 8.

A debtor, against whom an affidavit of debt has been filed, under the provision of the above act, will be deemed to have committed an act of bankruptcy, although he and his two sureties may have executed a bond in a sufficient amount before the expiration of the twenty-one days, unless such bond shall have been allowed by a commissioner before the expiration of the time: and his approval thereof, after the twenty-one days, but before the fiat issues, will not invalidate the act of bankruptcy, especially if the notice of application to the commissioner was for the day after.

This was the bankrupt's petition to supersede, upon the ground of no valid act of bankruptcy. The question was, whether he had complied with the provisions of the 1 & 2 Vict. c. 110. s. 8(1).

(1) By which it is enacted, "That if any creditor or creditors shall file an affidavit in her Majesty's Court of Bankruptcy, that such debt or debts

In this case the affidavit of debt was filed, and served upon the petitioner on the 24th of March. On the 5th of April, the petitioner executed a bond for the proper sum. On the 7th, it was executed by his two sureties. On the 14th, notice was served upon the creditor, that the commissioner would be attended on the 16th, to obtain his approval of the bond. On the 15th, the docket was struck by the creditor; and on the 16th the commissioner approved of the bond executed by the petitioner.

The question was, whether the bond, having been executed by the debtor and his two sureties within the proper time, but not having been allowed by the commissioner until after the twenty-first day, this was an act of bankruptcy within the meaning of the act.

Mr. Wright, in support of the petition.—The act of parliament has been sufficiently complied with, the petitioner having done everything which rested with him to do, within the twenty-one days. The bond was executed by him and his sureties, and it was a *sufficient* bond, for it was afterwards allowed by the commissioner. It would be a very hard case that the want of the commissioner's approval within twenty-one days should create an act of bankruptcy, for there are periods at which his approval could not be obtained, for instance, during the long vacation.

Mr. Swanston and *Mr. Mylne*, for the respondents.—The act requires that within the twenty-one days, the debtor should enter into such bond as a commissioner

is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing, requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits, and notice, pay such debt or debts, or secure or compound for the same, to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions, which shall have been brought for the recovery of the same, together with such costs, &c., every such trader shall be deemed to have committed an act of bankruptcy, on the twenty-second day after service of such affidavit or affidavits and notice."

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shall approve of; but here the bond was not approved of until after the twenty-one days had elapsed, namely, on the twenty-third day. There was either an act of bankruptcy on the twenty-third day, or there was not.

[*SIR J. CROSS*.—Many things pass in bankruptcy by relation. I do not know whether it can be so in this case, but it appears that everything was done by the bankrupt and his sureties which they *individually* could do.]

If upon the twenty-second day the commissioners had done nothing, there would have been a clear act of bankruptcy. Can the commissioners by their act make that no act of bankruptcy which was a valid act of bankruptcy before?

Mr. Wright, in reply.—If the bond be approved before the fiat issues, that is a good compliance with the terms of the act.

SIR J. CROSS.—The difficulty I have is this; the act says that the party shall be a bankrupt upon the twenty-second day, if certain acts are not done. Now, most unfortunately, you gave notice that you would apply for the approval of the commissioner upon the twenty-third day, one day after the time when the acts to be done should have been complete. I do not think I can relieve you; but if by the next day's sitting I should see more in the case than at present, I will give you the advantage of it.

April 30.—*SIR J. CROSS*.—I have considered this case, and do not see any mode by which I can relieve the petitioner in not having obtained the commissioners allowance of the bond in due time, especially as the day named for the purpose of obtaining it was one day too late.

Petition dismissed.

1841. { *Ex parte* N. P. WOOD, in
July 17, 28, 30. { *re* C. WEBSTER, A BANK-
RUPT.

Partners—Separate Estate—Interest—Joint-stock Bank.

A joint-stock banking company becomes insolvent, and a suit in Chancery is instituted to wind up the accounts. A separate fiat issues against one of its members, and his

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separate estate pays his separate creditors 20s. in the pound, leaving a surplus:—Held, that the joint creditors of the company are entitled to receive dividends out of the surplus, though the joint estate has not been administered; and that the separate creditors are not entitled to be paid interest prior to the joint creditors being made equal as to the principal.

The bankrupt was one of a large company, called the Imperial Bank of England. It appeared, that the company, which was established according to the Banking Company Act of Geo. 4, had become insolvent, and stopped payment in April 1839; since which, a suit had been instituted in Chancery, for the purpose of winding up the accounts; and various fiats had issued against a great number of individual members, and amongst them a separate fiat issued against the bankrupt. All his separate creditors were paid 20s. in the pound, and a surplus of 6,000*l.* remained in the hands of his assignees. Upon the assignees proceeding to make a dividend of this sum amongst the joint creditors of the company, it was objected, by the personal representatives of the bankrupt, who had died since his bankruptcy, that as the accounts of the company were being taken in the suit in Chancery, the surplus of 6,000*l.* should be paid into Chancery, to abide the result, and not be paid away to the joint creditors. It was also objected by the separate creditors, that they were entitled to interest upon their debts before the joint creditors were paid their principal. The commissioners delayed ordering a dividend, that the opinion of this Court might be obtained; whereupon, the present petition was presented by a joint creditor, on behalf of himself and the other joint creditors; and it prayed, that the joint creditors of the bankrupt, who had proved their debts under the separate fiat, might be declared entitled to receive dividends out of the surplus fund of the said bankrupt's separate estate, prior to paying the separate creditors interest upon their respective debts.

Mr. Swanston and Mr. Anderdon, in support of the petition.—The existence of a suit in Chancery cannot have the effect of staying the dividends. The joint creditors have a right, totally independent of the

state of the accounts between the partners. There is no distinction between this partnership and ordinary partnerships—

Ex parte Marston, 1 Mont. & Ch. 576; s. c. 9 Law J. Rep. (N.S.) Bankr. 5.

Ex parte Wood, 1 Mont. Dea. & De Gex, 92; s. c. 9 Law J. Rep. (N.S.) Bankr. 20.

It is also well settled, that the separate creditors are not entitled to interest upon their debts, before the joint creditors are paid their principal—

Ex parte Reeve, 9 Ves. 588.

Devaynes v. Noble, 2 Russ. & Myl. 495.

Mr. Saunders, for the separate creditors.—*Ex parte Reeve*, and the other cases upon the question of interest, were cases of a joint fiat; but here, the fiat is a separate one; and therefore the estate must be administered as if there were no joint debts. Lord Loughborough's order only relates to joint fiats.

Mr. James Russell and Mr. Rolt appeared, by permission, for the personal representatives of the bankrupt.—The joint creditors are not entitled to go against any surplus of the separate estate of any partner, while there remains joint estate of the joint debtors unadministered, or a solvent partner. This doctrine is laid down by Sir William Grant, in *Everett v. Backhouse* (1). Here, there is a joint estate, which is in a proper course of administration in Chancery. It matters not, that the joint estate is not to be administered in Bankruptcy.

[SIR J. CROSS.—The Court cannot take notice of the joint estate *dehors* the bankruptcy.]

The Court may do so, to exclude joint creditors; and it will assume, from there being joint estate not in bankruptcy, that there is a solvent partner. It matters not, that the joint estate is not in bankruptcy. In *Dutton v. Morrison* (2), Lord Hardwicke is said to have thought that the joint creditors might come at the joint estate by filing a bill; so that the joint creditors are bound, first, to have the joint estate administered, and then they may come against the surplus separate estate. The words of the 62nd section exclude the joint creditors from taking a dividend.

(1) 10 Ves. 98.

(2) 17 Ibid. 207.

Mr. Swanston, in reply.—As between debtor and creditor, the creditor has a right to have his debt paid, irrespective of the accounts between the partners: as between the two classes of creditors, indeed, the right to have the joint estate administered arises. The mistake of the other side is, in looking upon the personal representatives of the bankrupt as creditors. In *Ex parte Chandler* (3), the joint creditors were permitted to receive the dividends under a separate commission, upon paying the separate creditors the amount of their debt. So in *Ex parte Taitt* (4). See also *Ex parte Holmes* (5). It is plain, from the 62nd section, that the joint creditors were only to be delayed receiving their dividends until the separate creditors should be first paid their debts. As to the question of interest, he referred to *Ex parte Minchin* (6); and the words of the 132nd section of the Bankrupt Act.

July 30.—Sir J. Cross.—It was contended, on the part of the personal representatives of the bankrupt, that the joint creditors of the bankrupt were not entitled to be paid out of the surplus of the separate estate, but that the surplus should be paid into the Court of Chancery, there to abide the result of the accounts between the partners. There is no distinction between this partnership and an ordinary partnership of three or four. Now, it is an established rule, that where there are joint and separate debts in a bankruptcy against one individual, when all the separate creditors have been paid 20s. in the pound, and there remains a surplus, that surplus must go in payment of the joint creditors. Lord Eldon considered this rule so well established, that in *Ex parte Reeve* he said, "It is now clearly settled, that where there is a partnership and separate debts also, the partnership shall not be admitted a creditor upon any individual, nor any individual upon the partnership, until the creditors of the individual and the creditors of the partnership are satisfied to the extent of 20s. in the pound out of the respective estates. Also, that where the separate

creditors are paid 20s. in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors, but shall go to make the joint creditors equal with them as to the principal." This disposes of both the questions which were raised.

Ordered as prayed. The costs of the petitioner and the assignees out of the estate; other parties to bear their own costs.

1841. { *Ex parte W. M. THOMAS in re*
July 21, 30. { J. W. THOMAS AND LUCY
THOMAS, BANKRUPTS.

Order and Disposition—True Owner—Executor de son tort—Goodwill.

An executor de son tort takes possession of the intestate's effects, pays some of his debts, and carries on the trade for two years, when he becomes bankrupt, no person having taken out letters of administration:—Held, that the effects of the intestate did not pass to the assignees of the bankrupt, as being in his order and disposition, with the consent of the true owner.

Semble—Where a lease expires by bankruptcy, there can be no good-will for sale.

The petitioner in this case was the administrator and one of the sons of Susanna Thomas, who had carried on the business of an hotel-keeper in Bristol for several years, and down to the month of July 1838, when she died intestate, leaving three sons and one daughter, namely, the petitioner, the two bankrupts, and another son. It appeared, that immediately upon the death of the mother, the two bankrupts, without taking out letters of administration, entered into possession of the hotel, and all the goods and effects of the intestate therein, and continued to carry on the business down to the month of October 1840, when a fiat issued against them, they having, in the meantime, paid and satisfied many of the debts of their mother, and interest upon other debts. The assignees chosen under the fiat took possession of all the effects appertaining to the hotel, as having been in the order and disposition of the bankrupts, and sold them, together with the good-will of the concern. It appeared,

(3) 9 Ves. 35.

(4) 16 Ibid. 193.

(5) 2 Rose, 93.

(6) 2 Glyn & Jam. 287.

that the lease by which the premises were held expired by the bankruptcy; but nevertheless, the in-coming tenant paid the assignees the sum of 200*l.* upon being admitted. The evidence in the case was rather contradictory—some of it going to prove that the bankrupts were looked upon merely as the personal representatives of the intestate, and only holding the property subject to the debts and liabilities of the intestate; other parts of it, going to shew that the bankrupts were considered as the absolute owners of the property. The petitioner, who, subsequently to the bankruptcy, and at the request of the creditors of the intestate, took out letters of administration to the intestate, contended, that the goods and effects could not be considered as having been, at the time of the bankruptcy, in the order and disposition of the bankrupts, with the consent of the true owner, and therefore could not have passed to the assignees as part of the bankrupts' estate: and the petition prayed that the assignees might be ordered to account for and pay over to the petitioner the proceeds of the said goods and effects of the intestate, together with the sum received by them in respect of the good-will.

Mr. Swanston and *Mr. Osborne*, in support of the petition.—The bankrupts in this case acted as trustees of the property, and never pretended that it was not liable to the debts of the intestate—they were, in fact, executors *de leur tort*, and were therefore trustees; and consequently, possession by them cannot enure to the benefit of their own creditors, to the exclusion of the intestate's.

Mr. James Russell, *contra*.—First, as to the good-will: the term having expired, the sale of the good-will is quite imaginary—*Farr v. Pearce* (1).

Mr. Swanston.—*Farr v. Pearce* was a very different case: it was the case of a professional partnership, in which there was a personal trust which survived; and the Vice Chancellor observed, that such partnerships were very different from commercial partnerships.

[*Sir J. Cross*.—I have never known an instance in Bankruptcy of such a good-will being sold. There is no such abstract property as good-will. In some cases, there

(1) 3 *Mad.* 76.

is what is called a local good-will, especially in the case of an inn. There is also a good-will that is purely personal; but here, there is no local good-will, for the term has expired; and if there was a personal good-will, that would remain in the bankrupts, and could not have passed to the assignees, it being only the power to recommend customers to the house. I do not think that there is any such property as good-will belonging to either of these parties, especially as there is no local good-will in the assignees.]

Mr. Russell, upon the rest of the case.—The goods and chattels of the intestate must be considered to have been in the order and disposition of the bankrupts, with the consent of the true owner, at the time of the bankruptcy. There must always be some true owner. From the death of the intestate, any person interested in the administration of the effects is entitled to apply for letters of administration; but no person applied in this instance; therefore the property must be considered as having been in the order and disposition of the bankrupts, with the consent of the true owner, who must be considered to be either the ordinary, or those persons entitled to apply for letters of administration. After the bankruptcy, indeed, the petitioner took out letters of administration: then will not his acquiescence have relation back to the death of the intestate?—*Fox v. Fisher* (2), and the cases there cited.

Mr. Swanston, in reply.—In *Fox v. Fisher*, the possession was adverse, and the ground of the judgment was the length of time which had elapsed since the death of the intestate; but in the present case, the bankrupts acted in the character of trustees and personal representatives.

[*Sir J. Cross*.—In *Fox v. Fisher*, the Court seem to have come to a conclusion of fact, namely, that the son was the true owner, because he was entitled to take out letters of administration; but the ordinary may grant the letters of administration to such person as he may think fit. I fear that I am bound by the authority, though I cannot see that there was a true owner in that case.]

The two cases are very distinguishable. In *Fox v. Fisher*, the question as to the

(2) 3 *B. & Ald.* 135.

possession being a trust, was not raised; but here the possession was purely fiduciary, and the acts of the bankrupts were such as to authorize any person to charge them as executors *de leur tort*. But an executor *de son tort* cannot be in a better position than an executor by right. The trust, therefore, is clearly proved.

July 30.—SIR J. CROSS.—The question in this case is, whether the property of the intestate, Susanna Thomas, belongs to the assignees of the bankrupts, as property in the order and disposition of the bankrupts at the time of the bankruptcy, with the consent of the true owner, or to the petitioner as administrator. The petitioner did not take out letters of administration until after the bankruptcy. The intestate left three sons and one daughter. One of the sons and the daughter took possession of the effects. The petitioner did not meddle with the effects, though he, together with the bankrupts, was entitled to take out letters of administration. The first question is, whether the bankrupts should be considered to have been in the possession of the intestate's property as executors *de leur tort*, or as strangers having the possession of the effects with the consent of the true owner. When the case was argued, I was much pressed with the case of *Fox v. Fisher*; which, in some particulars, resembled the present. There, the son of an intestate had succeeded to the business of his mother, as an hotel-keeper; he carried on the business for twelve years, without any person questioning his right to the property; he had not taken out administration to his mother, who died intestate. Administration was taken out, after the bankruptcy, by a creditor of the intestate, and the same question as here was raised, namely, whether the bankrupt had the possession of the intestate's property with the consent of the true owner; and the question turned upon this—who was the true owner? The Court decided, that after the acquiescence for so long a time as twelve years, it belonged to the assignees, as property in the order and disposition of the true owner. Bayley, J. said, "Here, the bankrupt had for nearly twelve years possession of these goods, with the consent of all who were entitled to dispute it with him; and that is

enough to satisfy the words of the statute." It is remarkable, that in that case the point was not made, that the bankrupt might have been looked upon as a trustee; and it has been justly urged by Mr. Swanson, that had that point been urged in argument, the judgment of the Court might have been very different. But the lapse of time seemed in that case to form the ground of the decision. With respect to that decision, therefore, upon which I hesitated, I am of opinion, that it must not be taken to establish a rule, that the mere possession of the trade stock by an executor *de son tort* will bring the property within the rule of reputed ownership. And I am of opinion, that the property in question was held by the bankrupts as executors *de leur tort*; and was not in such a position as to bring it within the order and disposition clause. I have already disposed of the question of good-will.

Ordered as prayed, except so much as related to the good-will. Petition dismissed as to that part.

1841. { *Ex parte W. PENNELL AND
OTHERS in re THOMAS
July 16, 24. KEARSLEY AND J. L. KEARSLEY, BANKRUPTS.*

Annuity, Proof of—Merger in higher Security.

A, B, and C, (C. being a surety only,) jointly and severally granted an annuity in consideration of a sum of money paid to A. and B, and covenanted that they, or some or one of them, would pay the annuity. A warrant of attorney was also given to enter up judgment against the three, or any or either of them, as a further security for the payment of the annuity; and a joint judgment was entered up against the three. A. and B. became bankrupts:—Held, that the grantee of the annuity might prove under that fiat against the two for the value of the annuity; the debt on the covenant not being merged in the joint judgment against the three; and A. and B. being the grantors who received the consideration money.

This was the petition of the assignees, and the object of it was to expunge the proof which the commissioners had admitted, in respect of the value of an an-

nuity, granted to one Richard Ullathorne. The question arose upon the deed of grant, dated the 19th of June 1837, which was made between the bankrupts of the first part; William Kearsley of the second part; and the said Richard Ullathorne of the third part; by which, after reciting the agreement for the purchase of the annuity, and that it should be secured by that indenture, and also by a warrant of attorney to confess judgment against the two bankrupts, and the said William Kearsley, who agreed to join therein as a surety, it was witnessed, that in consideration of 4,000*l.* paid to the two bankrupts by Ullathorne, they, the said bankrupts, and Wm. Kearsley, and each and every of them, did give, grant, &c. an annuity of 800*l.* to Ullathorne, to be reduced to 400*l.* upon the same being regularly paid. And the said bankrupts and Wm. Kearsley did thereby, for themselves, their heirs, executors, and administrators, *jointly, and any two of them separately*, apart from the others and other of them, did thereby, for himself, his heirs, &c., severally covenant, promise, and agree with and to the said R. Ullathorne, his executors, &c., that they (the said bankrupts) and Wm. Kearsley, or some or one of them, or some or one of their heirs, executors, &c., should and would well and truly, pay, &c. And it was agreed that the judgment, so to be entered up against the said bankrupts and Wm. Kearsley, should be considered only as a further security for the payment of the said annuity. Judgment was accordingly entered up against the bankrupts and the said Wm. Kearsley. A joint fiat issued against the bankrupts on the 1st of February 1841. Ullathorne tendered his proof under the fiat for 3,804*l.*, being the amount of the arrears, together with the value of the annuity. This proof was admitted by the commissioners; and the questions now raised by the assignees were, first, whether the covenant to pay the annuity was not merged in the judgment; for if so, the judgment, a joint one against the three, could not be proved, under a joint fiat against two of them; secondly, whether the covenant was not by the three jointly, or by each separately, and therefore not proveable under a fiat issued against two of the three only.

Mr. Spence and Mr. James Russell, in

support of the petition.—Should the annuitant claim to prove in respect of the covenant, the objection is, that the covenant is merged in the greater security, namely, the judgment—*Ex parte Christie in re Geddes* (1). But admitting that the covenant is not merged in the judgment, still as the covenant to pay is by the three, or some one of them, proof cannot be allowed against two of them jointly. Moreover, as the proof, for the value of the annuity, must be made under the 54th section of the 6 Geo. 4. c. 16, and as that section refers to the grantors of the annuity as the persons liable to the proof, the proof, in respect of this annuity, could only be made against the three jointly, or against each separately, but not against two jointly. Therefore the proof must be expunged.

Mr. Swanston and Mr. Anderdon, in support of the proof.—The covenant cannot have merged in the judgment, for it was expressly agreed between the parties, that the judgment should be for an additional security. The grantors of annuities are certainly the persons against whom proof, for the value of the annuity is intended by 6 Geo. 4, to be admitted; but the actual grantors in this case were the two bankrupts. Wm. Kearsley joined only as a surety; the bankrupts alone received the consideration money—

Thompson v. Thompson, 2 Bing. N.C. 168; s. c. 4 Law J. Rep. (N.S.) C.P. 311.

Ex parte Christy, 2 Dea. & Chit. 155; s. c. 1 Law J. Rep. (N.S.) Bankr. 104.

Maber v. Hobbs, 2 You. & C. 317; s. c. 6 Law J. Rep. (N.S.) Ex. Eq. 12.

Ex parte Bate, 3 Dea. 358.

Twopenny v. Young, 3 B. & C. 208.

Mr. Spence, in reply.

SIR J. CROSS.—This was an application, on the part of the assignees, to have the proof of a debt expunged from the proceedings, which they allege has been improperly admitted by the commissioners. The debt arose upon an annuity; the annuity has been valued in the regular way, and proof has been admitted. Two objections have been raised to the proof; first, that the debt upon the covenant had

(1) Mont. & Bli. 352; s. c. 1 Law J. Rep. (N.S.) Bankr. 103.

merged in the judgment, and that as the judgment was joint against the three grantors, proof could not be admitted against the two bankrupts. Secondly, that as the deed was joint and several, proof could not be admitted under it, but against the three jointly, or each separately. It is clear, from the authorities which have been cited, that a debt need not necessarily merge in a higher security, and that merger may be prevented by the agreement or intention of the parties. Now, it was expressly agreed between the parties here, that the judgment should operate as a collateral and further security for the annuity. I am therefore of opinion, that the covenant did not merge in the judgment. It would be contrary to reason, that a future annuity debt should merge in a by-gone judgment. The question then is, whether the annuitant is warranted in charging the debt against any two of the grantors. It appears that the consideration for the annuity was received by the two bankrupts alone; and that, in fact, Wm. Kearsley was a party to the deed only as a surety. By the terms of the deed, the three, and each and every of them, granted the annuity, and then covenanted.—[His Honour then read the covenant.]—There is certainly much confusion and tautology in this covenant; but I am of opinion, that the intention of it was, to bind the three, or any two, or one, to the payment; and, therefore, that the commissioners were right in admitting proof of this debt.

Petition dismissed, costs of all parties out of the estate.

1841. { *Ex parte* SMITH AND AN-
July 23, 30. { OTHER in re STYAN, A
BANKRUPT.

Insurance—Assignment of Policy—Notice—Order and Disposition.

The bankrupt, who was the owner of two policies of assurance in a mutual assurance office, assigned them to a creditor to secure a debt; but no notice of the assignment and transfer was given to the company, until after the act of bankruptcy, which occurred seven years after the assignment:—Held, that the bankrupt was not the reputed owner of them, after so long a period as seven years,

and that they could not be considered to be in his order and disposition from the want of notice only.

Semble—The question of reputed ownership is purely a question of fact.

Quære—Must not a dealing and transaction, to be within the protection of the 2 & 3 Vict. c. 29, be a dealing or transaction with the bankrupt personally?

This was the petition of the executors of a creditor to whom the bankrupt had assigned and transferred two policies of assurance, effected by the bankrupt in the Equitable Insurance Office, which was a mutual assurance company, for the purpose of securing his debt of 3,000*l*. No notice was given to the company of the assignment. Seven years elapsed, and then, upon the 15th of March last, the bankrupt committed an act of bankruptcy, of which the petitioners had no notice. On the 22nd of March the petitioners gave notice to the company of the assignment; and on the 1st of April, a fiat issued against the bankrupt.

The object of the petition was, to obtain an order for the sale of the policies, the proceeds to be applied in payment of the debt, with leave to prove for any deficiency.

The first question was, whether the notice to the company, on the 22nd of March, was such a dealing and transaction by and with the bankrupt, as was protected by the 2 & 3 Vict. c. 29, and so a good notice to the company of the assignment, although after the act of bankruptcy. That statute enacted, amongst other things, "That all contracts, dealing, and transactions, by and with any bankrupt, really and *bona fide* made and entered into before the date and issuing of the fiat against him, should be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the party had no notice of such act of bankruptcy."

The next question was, whether, supposing that notice, on the 22nd of March, not to be good, the want of notice was sufficient to leave the policies in the order and disposition of the bankrupt, as reputed owner, so as to pass to his assignees.

Mr. Swanston and Mr. Bacon, in support of the petition.—This was a transaction within the meaning of the 2 & 3 Vict. c. 29; it would be absurd to say, that the trans-

action must be *personally* with the bankrupt, for then a transaction with an agent would not be protected. In this case, the bankrupt was a partner in the company, and therefore was bound by their acts, as much as by an appointed agent.

[SIR J. CROSS.—Is not the meaning of the statute this, that the transaction must be between two persons at the least, one of whom must be the bankrupt? You seem not to give any effect to the word "by;" the statute says, "by and with the bankrupt."]

That is to meet the case where the transaction was by the bankrupt, as the only active party; in other transactions he might be quite passive, and the meaning of the statute is, such a transaction as would bind the bankrupt. The only effect of the statute is to change the time of the fiat's issuing, as the period at which the bankrupt law is to take effect, in certain cases, instead of the date of the act of bankruptcy. But supposing the notice, on the 22nd of March, bad, still notice was not necessary, and after so long a period as seven years, the bankrupt was not to be considered as the reputed owner, or as having the policies in his order and disposition. The company would not have paid the amount without the production of the policies.

Mr. Stinton, contra, for the assignees, cited—

Williams v. Thorp, 2 Sim. 263, and the Vice Chancellor's judgment there, commenting on *Ex parte Monro*, Buck. 300.

Ex parte Usborne, 1 Glyn & Jam. 358.

Ex parte the Vauxhall Bridge Company, 1 Glyn & Jam. 101.

Ex parte Colvill, Mont. 110.

Mr. Swanston, in reply, cited *Gibson v. Overbury* (1).

July 30.—SIR J. CROSS.—The petition in this case prays for the usual order to have two policies sold, the proceeds to be ap-

(1) *Post*, Exch. p. 219.

plied in payment of the testator's debt, and liberty to prove for any deficiency. The testator and the petitioners have had the possession of the policies for the last seven years; but it was contended on the part of the assignees, that, unless notice of the transfer and assignment was shewn to have been given to the company, the policies must be presumed to be in the order and disposition of the bankrupt, with the consent of the true owner; and that the bankrupt was the reputed owner of the policies. It appears to me too strong a proposition to contend for, that, because the holders of these policies have not proved that they gave notice to the company, the Court is bound to conclude that they left the property in the hands of the bankrupt, to be dealt with by him in such manner as he might please, and also that he was the reputed owner. I cannot come to this conclusion merely from the want of notice, it being clear that the policy holders have had possession of them for the last seven years. It was urged, that the bankrupt had the power of parting with the policies to some one else, that is, that he had the power to commit a fraud. Under these circumstances, though the petitioners cannot prove that they gave notice of the assignment of the policies, I cannot come to the conclusion that the property was left in the order and disposition of the bankrupt, or that he was the reputed owner thereof. I am aware that this opinion is at variance with some of the authorities; but it has been agreed on all hands, that the question, whether or not a bankrupt was the reputed owner of property, is always a pure question of fact; and upon the evidence here, I cannot decide that he was the reputed owner of these policies. Under these circumstances, I think the petitioners are entitled to prove their debt, and to have the policies sold; but, as this question is of very frequent occurrence, I should wish it to be decided upon a special case.

Ordered as prayed.

IN the course of this year, His Honour SIR GEORGE ROSE was appointed to the office of a Master in Chancery, and subsequently to such appointment did not sit as a Judge in the Court of Review.

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- Master of the Rolls no jurisdiction over Master of the Court of Common Pleas, to order him to vacate memorandum or minute of order directing payment by defendant of sum of money into court, which memorandum or minute has been entered pursuant to the provisions of 1 & 2 Vict. c. 110, and afterwards the person of the defendant had been attached upon process of contempt, for non-obedience to the order. *Seem*, no such order to vacate necessary, if Court had jurisdiction in the case. As to exercise of jurisdiction of Court in such a case, so as not to leave the defendant in custody, where he offers proper terms, Ch. 97
- Assignment**. See Assurance.
- Assurance**—Notice to society of assignment of a life policy not necessary to complete title of assignee, where assurers and assured partners, Ch. 307
- Attachment**—Writ of, returnable immediately, means immediately after the caption; and execution is not limited to any particular time; but, *seem*, must be within a reasonable time. Attachment issued before abatement of original cause, revived by order to revive the suit, Ex. Eq. 56
- Attorney General**—Necessity of certificate of, to petitions under 52 Geo. 3. c. 101, Ch. 172
- not allowed to appear, except in support of charity information, where there is a relator, Ch. 201
- Attornment**. See Interpleader.
- Banker**. See Bankrupt.
- Banking Company**—Bill by two shareholders, (who had paid up their calls,) on behalf of themselves and all the other shareholders except the defendants, against several directors, trustees, registered officer of the company, and such of the shareholders as had not paid their calls, and praying the assistance of the Court to relieve them from difficulty that had arisen, by causing the assets of the company to be realized, and the debts to be paid, and that for such purpose a receiver might be appointed and authorized to sue for the calls remaining unpaid, and for the debts due to the company, in the name of the registered officer, not demurrable for want of equity and want of parties, where joint-stock banking company established under 7 Geo. 4. c. 46, stopped payment, being very largely in debt at the time: the business became wholly suspended, but not dissolved; and there were considerable assets in the hands of the directors (who had all become bankrupt except one) and trustees of the company, though not equal to the debts; and the directors who had become bankrupt, had, according to the rules of the company, become incapable of acting, and the trustees had refused further to act in the affairs of the company, Ch. 137
- Bankrupt**—Right of plaintiffs to set off debt due from them to A against balance due from A to banking firm, where A had executed a mortgage to bankers, M and B, to secure any balance that might become due on his banking account, either to them or persons who should constitute the banking firm, and A became indebted on his account to M and B, and after the death of B, to M and D, and afterwards, when the balance was against him, the banking business, and all debts and securities were assigned to the plaintiffs, who subsequently became indebted for work and labour to A, Ch. 113
- Bankrupt**—Purchaser of shares of mine from assignee of bankrupt, the assignee having become a subscriber in the name of "himself and friends," on sale of the mine to new adventurers, a trustee of the shares and subsequent profits for the benefit of the bankrupt's creditors, Ch. 249
- Oblige of joint bond of bankrupt proving against his estate for principal and interest, where estate yields a surplus, entitled to apply dividends received from time to time in discharge of interest then due, and the surplus in discharge, *pro rata*, of the principal; and his remedy against the co-obligor not affected by such payments. Official and general assignees ought not to sever and appear separately at the hearing, Ch. 356
- Assignment by trader, indebted to estate of testator, in May 1831, to residuary legatee of a share in a manufacturing concern, in consideration of a sum of money paid to the trader, and the securities for his debt being given up. Manufacturing business carried on in the name of the trader, until the 2nd of January 1832. 26th of January, fiat in bankruptcy issued on a debt prior to the assignment:—Share in the manufacturing concern held not in the order and disposition of the bankrupt. Assignment of house and furniture, in July 1831, to the trustees of son's marriage settlement, as a further security for the payment of a sum of money secured to them upon the bond of the trader, not an act of bankruptcy, Ch. 385
- See Injunction. Legacy.
- Baron and Feme**—Mortgage money sufficiently reduced into husband's possession, where wife before marriage entitled to sum secured by mortgages, the legal estate in the premises in one of the mortgages being vested in her, and in the other in a trustee, and the husband, in consequence of the mortgagor's being unable to pay off the mortgages, has procured another person to do so, on an agreement to assign all his interest in the premises to such person, Ch. 40
- Invalidity of marriage celebrated in a foreign country, according to the rites of the Church of England, not at the residence of a British ambassador, or in a British factory, or according to the *lex loci*. Where settlement on marriage of a ward of court directed, so as that husband shall not take any interest in wife's fortune, Ch. 100
- Protection of wife's separate settled estate, where some trustees under marriage settlement aid her husband to disturb her enjoyment thereof, and where she has revoked an authority to the trustees to pay the rents to her husband, Ch. 116
- Right of married woman living separate from her husband, to a settlement, where she is entitled to a chose in action, consisting of a principal sum, and not being in the shape of income, Ch. 199
- Process against a married woman as a *feme sole*, where she sues as plaintiff by her next friend, Ch. 208
- Where *feme covert* stated to be a partner, a necessary party to bill respecting the partnership, Ex. Eq. 24
- See Legacy. Trust.
- Bill**—not dismissed where replication filed, but subpoena to rejoin, or order for commission to examine witnesses, not served until three weeks after date of replication; *seem*, defendant should discharge order for issuing commission to examine witnesses, Ch. 261
- See Orders, 26 Aug. 1841, Ch. 411
- Bill of Revivor**. See Pleading.
- Bill pro Confesso**. See Contempt.
- Bond**—Admission of destruction of, by one of two obligors, where sufficient to support decree for payment against both. As to decreeing payment of

arrears with interest in suit on annuity bond, Ch. 219
Bond—Application of dividends received by obligee from estate of bankrupt joint obligor, and remedy and amount of claim against co-obligor, Ch. 356
 — See Principal and Surety.

Case—Where court of equity will send a special case for the opinion of a court of law, Ch. 38

Charity—Order confirming Master's report as to scheme, on petition presented under 52 Geo. 3. c. 101, no answer to information by Attorney General, complaining of scheme adopted on report obtained under that act in his absence. Necessity of Attorney General being a party to inquiries directed under that act. Principle on which the Court acts, and course pursued, where new interests have been created, and much money has been expended under scheme adopted by the Court, where no one has attended on behalf of the Attorney General before the Master. Presumption as to faithful discharge of duties of parties assigned to settle receiver's accounts, where no allegation or proof of neglect or error. Where masters of charity school not permitted to take boarders, and where the Court will disapprove of a scheme sanctioning their doing so. Proper object to provide means of gratuitous instruction in all branches of learning and information likely to be beneficial to scholars, and children under six years of age, if capable of receiving instruction, not to be excluded, where foundation or ordinance "to instruct and teach all boys and very young children, that should come to learn their A, B, C, primer and sorts till they be in grammar," Ch. 58

— What an admission of assets, to render executor of executor liable to purchase stock to produce an annual sum to be paid to the poor of a parish, Ch. 90

— General demurrer allowed to information and bill by Attorney General on behalf of charity on relation of persons also plaintiffs, as no title stated to individual relief, though title to relief shewn so far as sought, for the benefit of the charity. Amendment generally, but not to remove plaintiffs from continuing as relators, Ch. 110

— Reference to Master to approve of such sale or mortgage of charity estate, as may be necessary to pay costs ordered to be paid out of the estate Ch. 162

— Discretion of the Court to decline making order on petition, under 52 Geo. 3. c. 101, and to require parties to proceed by information. Reference to the Master under 52 Geo. 3. c. 101, to approve of a scheme for application and administration of surplus income, ought not to be made pending questions respecting the administration of the charity; but if made *ex parte*, and the whole subject so referred is left to the exclusive management of the petitioners (the trustees), whose administration of the funds is complained of, and right to be trustees disputed, the question of costs of other petitioners under the act raising the points in difference, will be reserved until the decision of the Court, upon an information filed for the administration of the surplus fund. Necessity of certificate of Attorney General to all petitions under 52 Geo. 3. c. 101, except such as relate to matters growing out of, or have reference to what the Court has before done on a petition properly certified. (The Attorney General v. the Earl of Stamford recognized and confirmed.) Ch. 172

— Construction of a will as to the application of a fund, where direct objects of a charitable bequest fail; and when the doctrine of *cy-pres* may be adopted. As to right of Attorney General to appear, where there is a relator, except in support of charity information, Ch. 201

Charity—Order, without reference to the Master, to increase allowance of Craven scholars, from 50*l.* to 75*l.* per annum, on certificate by trustees of approval of such application of surplus income, Ch. 361

— Petition presented under 2 Will. 4. c. 57, and praying for a reference for the appointment of new trustees, and for the approval of a scheme, and for an inquiry as to the charity property, and in whom the legal estate was vested, need not be intituled in Sir Samuel Romilly's Act (52 Geo. 3. c. 101), Ch. 368

— What costs are usually allowed to successful relator; where he will be entitled to costs, charges and expenses incidental and preparatory to the information; and on what fund such costs are to be charged, Ch. 373

Company—Liability of directors who have subscribed for shares in trust for the company, for the purpose of procuring act of parliament, and after the act has been obtained have transferred them to the secretary, to be held by him at the disposal of the board; and duty as to making calls in respect of all such shares equally with the calls on registered shares, Ch. 73

— See Banking Company.

Compensation. See Devise.

Contempt—Right of prisoner in custody for, for want of appearance, to discharge at the expiration of thirty-five days of rule 13, 1 Will. 4, where plaintiff has not entered an appearance within that time, Ch. 326

— Rule 2 of 1 Will. 4. c. 36, not applicable to proceedings in Exchequer. Whether defendant brought up under rule 6, is to be examined by the plaintiff, or must plead his excuse? Ex. Eq. 1

— See Arrest. Exceptions.

Contingent Remainder. See Power.

Contract—Plea to bill to carry into effect a contract made in a foreign country, and to take an account on the footing thereof, that by the law of that country the contract was illegal and void, and would subject the parties to a criminal prosecution, a good plea in bar to the relief sought, and not double, on the ground that some of its averments went only to a discovery, Ch. 47

— Agreement by owner of leasehold estate, on persuasion of conveyancer that other parties were entitled, that the estate should be sold, that all parties should share in the purchase-money, and that conveyancer should receive 40*l.*, ordered to be delivered up to be cancelled, with costs as against the conveyancer, Ch. 84

— Where bill for specific performance, and action for damages, sustainable at the same time, Ch. 251

— Where vendor no right to rescind, Ex. Eq. 46

Conversion. See Will.

Conveyancer. See Contract.

Copyhold—Court of equity *no* jurisdiction to decree partition of copyhold lands, Ch. 35

— Lord not compellable to renew for life or lives without remuneration, nor without proof of custom to renew for life or lives, on payment of fine certain, on bill by A and B, assignees from M, by way of mortgage, where L, the surviving life of copyhold property in a manor, in which copyholds are held for lives only, renewable on payment of a fine to be agreed on between lord and tenant, surrenders "to the intent and purpose that the lord of the manor may re-grant the same to J. M. or such other person or persons, and for such life or lives, estate or interest, as shall be agreed on between lord and J. M," but J. M. is never admitted, and the lord takes possession after the death of L. J. M. a proper party to bill by assignees to compel grant; but bill dismissed, without costs, on account of laches of lord in presenting petition of appeal, Ch. 289

Copyhold—As to injunction to restrain working mines so as to injure copyholders' houses, Ch. 398

Copyright—Where the Court will not restrain an advertisement of statement, that an edition of a work to be published by defendants, would contain the whole of the commentaries or observations as written by the author, or bequeathed by him, or the whole of his last corrections or improvements and additions, where additional copyright of commentary, and author's revisions and additions made thereto, sold to plaintiff, and copyright of early edition has expired; and distinction between injunction to prevent publication of libel on work, and to protect copyright, Ch. 275

— Whether party who has parol assignment of a work, but no legal title, and has permitted importation in the trade for six years, can, by obtaining the legal title afterwards, acquire the right of excluding others from the privilege of publication? Copyright communicable by a foreigner to a subject of this country, for the time limited by 8 Ann. c. 19. *Semble*, legal title in plaintiff not absolutely necessary for an injunction, Ex. Eq. 50

Corporation—Rule as to making officer of corporation a defendant, applicable to bill for relief as well as discovery, and also to making several officers defendants. Common injunction obtained against corporation dissolved on coming in of their answer, though officers made defendants to obtain discovery on oath have not answered, Ch. 30

— not divested of interest in trust property, by resolution of 30th of May 1835, after leave given to bring in Municipal Corporation Act, that stock and turnpike bonds should be transferred to certain persons, "so as to vest in them, and to divest the corporation of all power and controul over the same," deed of transfer executed by corporation on the same day, and deeds executed in November by parties to whom the transfer was made, declaring the purposes to which the stock and funds were to be applied, which were for the benefit of charitable institutions and endowment of churches in the borough. Corporation entitled to relief against acts done by officers amounting to breaches of trust; and against some of the members who have joined in committing a breach of trust, without bringing all before the Court, Ch. 53

Costs—of persons establishing their claim as some of the next-of-kin, though not parties to the cause, the same as successful claimants who are parties; but such costs do not include the costs of establishing their claims before the Master, Ch. 2

— of separate motions for production of documents and payment of money into court, where ordered to be paid by plaintiff, Ch. 30

— Extra costs to be borne by B, where A, having received notice of motion to dismiss, filed replication, and tendered 20s. costs to B, who requested time, and, upon the whole of the day being given him to answer, gave no answer till the following day, which was motion day, and A delivered his brief on the motion after eight on the preceding evening, Ch. 69

— of affidavits filed in support of or opposition to petition allowed, whether read or not at the hearing, unless special directions with reference to such costs given, Ch. 115

— Interest on, not chargeable, where ordered to be paid out of an estate. Reference to Master to approve sale or mortgage of charity estate, for the purpose of raising a sum for costs directed to be paid out of the estate, Ch. 162

— of proceedings to procure representation on bill for foreclosure of leaseholds, against representative of mortgagor, Ch. 163

— Defendant ordered by decree to pay costs as

between party and party, not liable to pay extra costs incurred by relator being obliged to take new office copies, in consequence of original papers being destroyed by fire in his solicitor's office, Ch. 177

Costs—Who entitled to costs in legatees' suit by adult, and infant plaintiff by next friend, where, after decree and payment of money into court, next friend dies, no other next friend is appointed, adult plaintiff does not prosecute the suit, and the defendant, the executor, files a supplemental bill, and brings on the cause for further directions, Ch. 197

— of motion to discharge prior order included, where notice of motion to discharge order with costs, and order is obtained accordingly, Ch. 218

— Refusal of, on notice of motion entitled in a cause "by bill of revivor," and bill was properly of revivor and supplement, Ch. 222

— Question as to irregularity of order for taxation of bill of, where petition for, entitled in a cause not in existence, is amended after hearing is adjourned for that purpose, without affixing a new fiat, Ch. 230

— of impertinent and scandalous affidavits payable by pauper, Ch. 232

— of suit to administer estate, out of what funds to be paid, Ch. 241

— Jurisdiction of Chancellor with respect to costs of petition that patent may be sealed, Ch. 248

— Where bill dismissed without, on account of laches in presenting petition of appeal, Ch. 289

— of motion in court below, where injunction is granted, costs in the cause, where uncertain how the facts of the case will ultimately turn out, Ch. 317

— of application for re-conveyance, Ch. 340

— of motion to put in answer after replication, Ch. 346

— Where trustees, defending separately, entitled to two sets of, Ch. 363

— Amount of relator's costs on charity information, and out of what fund payable, Ch. 373

— of application to amend by adding party, where made a condition precedent to obtaining order, Ex. Eq. 2

— See Demurrer. Mortgage. Savings Bank. Trust.

Creditors' Suit—Admission of debt by answer of one of two executors, a sufficient foundation for decree in, Ch. 356

— Where creditor, who has obtained judgment against debtor's executor, on a bill for payment out of the real estate, will not have leave at the hearing to exhibit interrogatories to prove the debt against the devisees; and as to the dismissal of the bill as against the devisees not being prejudicial to the filing of another bill against them, Ch. 384

— See Orders, 26 Aug. 1841, Ch. 411

— See Administration.

Debtor and Creditor—Court of equity no power under 1 & 2 Vict. c. 110, to make order of charge upon funds or interest in, belonging to a judgment creditor. Funds standing in the name of the Accountant General, as well as of private trustee, chargeable under the act. Judgment creditor, whose debt is charged upon fund in court, may obtain stop-order before expiration of six months from order of charge. Such order not void, though extending to whole of fund in which debtor has only a partial interest, but limited to operate upon that only. Stop-order on fund in court must be taken subject to, and after satisfaction of, prior claims, or all prior claimants must have notice of the petition, Ch. 21

— Where composition void, by reason of fraudulent representations of party agreeing to advance a sum for payment of the composition, and to furnish debtor with capital to carry on his business, and the receiving of securities from debtor's friends, and

agreeing with debtor to deduct a part of the advance in respect of a demand not made known to the creditors, Ex. Eq. 27

Decree—Construction of, as to charging defendant with compound interest, Ch. 12

Demurrer—Allowance of, without costs, where causes assigned on record disallowed, but causes assigned *ora tenus* allowed, Ch. 14

— Effect of allowing demurrer, and giving plaintiff liberty to amend by the same order, as to defendant's right to dismiss bill for want of prosecution, if plaintiff do not amend, Ch. 68

— Nothing admitted by, but what is properly pleaded, Ex. Eq. 33

— See Account. Discovery.

Devise—A, seised of fee simple in Jamaica, subject to mortgage in favour of B, devised the same to C for life, with remainder to his first and other sons, in tail male, with remainder, in default of such issue, to the right heirs of A, and then gave a legacy of 5,000*l.* to L, on the last contingency happening, payable out of the same estate. A, by the same will, created other charges on the estate, and also empowered C to charge the estate with certain portions for his daughters. C devised the estate to his daughters for successive estates for life, with remainders to their first and other sons in tail, subject to the mortgage to B, who was in possession of the estate, and to other charges after a prior life estate to his wife. The personal representatives of L did not dispute that B was entitled to possession of the estate, if anything remained due to him on his mortgage, and admitted that C had, out of the income of the estate, paid off part of the mortgage and of the charges created by the will of A, and had taken assignments of some of such charges to preserve a claim on the estate, in the event of his having issue male:—Held, that the tenant for life was entitled as against the devised estate, to stand in the place of the mortgagee for so much of the rents and profits as during his lifetime had been applied in reduction of the principal sum due on the mortgage; and that the personal representatives of L were not entitled to have a receiver appointed over the estate, as against B, the assignee of C, of the charges paid off by him; and having failed to shew that there was not vested in B, the mortgagee, a title to charges on the estate prior to their claim, and exceeding in amount the amount of compensation money standing in the name of the Accountant General, there was no ground for ordering the same to be transferred into the cause, Ch. 33

— Real estates devised to heir-at-law considered as descended estates, but not liable to pay testator's speciality debts, in exoneration of estates devised to other parties, but all the estates to contribute *pro rata*, Ch. 177

— Residue of personal estate directed to be invested in the purchase of lands situate as conveniently as might be to testator's estates in the parish of N, such lands to be conveyed to such uses, &c. as his present lands were limited to. Devise of one close of land at N. to C. M. C, in fee, and limitation of the rest of his estates at N. to several nephews successively for life, with remainder to their issue as purchasers, in tail male. Testator also devises an estate in the parish of S. K, ten miles from N, to J. T. C, for life, remainder to heirs of his body; and restricts the tenants for life from working lime-kilns, and empowers them to jointure their wives to an extent greatly exceeding the annual rents of the estates at S. K, on which there are no lime-kilns:—Held, that the principal estates at N. constitute the property to which the after-purchased lands were to be added, Ch. 178

Devise—Construction of will and codicils upon the question, whether devisee takes an estate for life or in tail; whether devise is revoked by codicil; and whether arrears of annuity charged upon lands, shall be raised by means of sale or mortgage, Ch. 185

— Rejection of the word "respective" in devise to three trustees and their respective heirs and assigns, with power to them and their respective heirs and assigns to sell and give receipts for the purchase-money, the same persons "and their respective heirs and assigns" being appointed executors, the estate being charged with debts, so as to enable two surviving trustees as executors, who had contracted to sell the estate, to make a good title, and give a sufficient discharge for the purchase-money, Ch. 195

— of all testator's property, whatsoever and wheresoever, to his wife, "for her sole use for ever," does not pass a mere legal or trust estate, in hereditaments, in which the testator had no beneficial interest, Ch. 348

— of freehold premises to wife, for her sole use and benefit, and appointment of wife, if she remained unmarried, "sole executrix and residuary legatee to all other property" testator might possess at his decease, passes the fee simple to the wife in the freehold premises, Ch. 349

— As to passing of real estates purchased after date of will, by will and codicil; and foundation of exception to general rule that such estates will pass, Ex. Eq. 5

— See Power. Will.

Discovery—Rule as to making officers of corporation defendants applicable to bill for relief. Defendant at law entitled to, not only to support affirmative case, but to sustain defence negatively, by disproving facts that plaintiff will be required to prove to maintain his action, Ch. 30

— Allegation in the bill of, in aid of action by devisor of lessor of copyholds to recover arrears of rent, that at the time of granting the lease the lessor was "seised or otherwise well entitled," not sufficiently clear as to the title of the lessor, and demurrer allowed, Ch. 36

— Mode of setting out accounts by representatives of deceased accounting party. Description of documents inquired after, where numerous, in schedule to answer, by general character, as contained in sealed packets, sufficient, Ch. 145

— That books of accounts belong to a partnership in which defendant or examinant has only a joint interest with others not parties, no ground of objection to setting them forth in answer or examination. Party otherwise bound to make discovery, only protected where he shews absence of legal power or of physical ability, Ch. 169

— Plaintiff, on bill for relief and discovery, not entitled to answers to interrogatories, relating to facts not material to relief, though defendants have answered some of such interrogatories containing imputations on their character. Whether bill for discovery of further evidence of matters, to be adjudicated upon by Privy Council, sustainable in this court by party who has appealed, Ch. 257

— See Pleading.

Dismissal of Bill. See Costs.

— *for want of Prosecution.* See Practice. **Dissenting Congregation**—Where injunction to restrain action of ejectment by trustees against minister not maintainable, Ch. 71

Dower—Widow of K. not entitled to dower out of undivided moiety of freeholds vested in K as mortgagee, subject to equity of redemption of F, K also claiming to be entitled to such undivided moiety, but the claim being disputed by F, and established by decree after K's death, Ch. 247

Dower—Title of widow to income arising from one-third of fund produced by timber cut down before dower set out, Ch. 302

Ecclesiastical Law—Certificate of contumacy in cause in Arches Court rightly issued by and in the name of the official principal. Competency of Ecclesiastical Court to proceed against absent party who is contumacious, by condemning him to payment of the sum for which the suit is brought; and subject-matter of suit sufficiently shewn to be within jurisdiction of that court, though sum claimed under 10*l.*, where certificate states contumacy in not obeying lawful commands to pay 2*l.* 5*s.*, rated and assessed upon the party, and 12*s.* 3*d.* costs, pursuant to monition duly issued, and by not paying those sums in a certain cause or business of subtraction of church-rate, the proceedings wherein were carried on in pain of his contumacy. Statement that writ was "delivered of record to sheriff of Leicestershire, before the Queen herself at Westminster," sufficient. Decrees of Ecclesiastical Court not interfered with by Court of Chancery, on the ground of irregularity, if subject-matter of the suit within the jurisdiction, Ch. 108

Ejection—by trustees against minister of dissenting congregation, where not restrained by injunction, Ch. 71

Election—Where plaintiff not required to elect to proceed at law or in equity; and effect of order to elect within a given time, as to staying proceedings, Ch. 251

— See Legacy.

Elegit. See Mortgage.

Equity—of owner of works occasioning a nuisance, against party who has allowed them to be erected, without notice of intention to object. Where lost by permitting party against whom it exists, to deal with property in ignorance thereof, so as to raise another inconsistent interest, Ch. 149

— See Parties. Pleading.

Estate Tail—Where barred in case of legacy directed to be invested in land, Ch. 341

Evidence—Whether parol evidence admissible to explain intention of testator, upon the question whether gift of annuities by will was to be in addition to annuities previously granted, Ch. 10

— Presumption of due discharge of duties of party appointed to settle accounts of receiver of charity, Ch. 58

— Effect of admission of destruction of bond by one of two joint and several obligors, in suit against both, Ch. 219

— Parol declarations of testator, where not suffered to countervail directions in will, Ex. Eq. 2

— Judgment in action on mortgage deed, strong *prima facie* evidence of debt then due, and not impeachable in equity, by evidence of conversations and general admissions, which might have been used as a defence to the action at law, Ex. Eq. 26

— Entries in steward's book in his favour, not referring to, or necessary to explain entries against him, not evidence of such facts; even though, at the end of the account, a balance is struck of all the items, which balance is against the steward, Ex. Eq. 57

Examination. See Witness.

Exceptions—Master empowered to make several enlargements for making his report upon, and none but the first required, under 12th Order of 1831, to be within fourteen days from date of order of reference, Ch. 7

— Time for excepting to answer, where defendant in contempt puts in answer, but does not pay costs of contempt till several days afterwards, Ch. 288

Exceptions. See Impertinence. Master. Witness.

Executor—How far payment of an annual sum by executor of an executor for several years is an admission of assets, so as to render him liable to purchase, according to the direction of original will, sufficient stock to produce that amount per annum, to be divided amongst the poor of a parish, Ch. 20

— or personal representative not ordered to execute assignment of leasehold premises without indemnity against past or future breaches of covenant, though no evidence of such breaches, and though he has never been in possession, and the premises have been sold under a decree of the Court, Ch. 109

— Personal liability of executor, the son of the testator, claiming a considerable part of the personal estate as a gift, where he has acknowledged the right of legatees, and promised to pay them, and has paid a sum to one legatee, to pay the legacies, if he has not recalled his promise to pay within a reasonable time. Where executor will be relieved from admission of liability made incautiously and by mistake. Payment of interest on legacy, or statement that it will be ready for legatee at twenty-one, or, as reason for refusal to pay, that personal estate was out on mortgage, *semble*, admission of assets. Forbearance of present demand on payment of interest, *semble*, a sufficient consideration to make executor personally liable, Ch. 124

— Contribution *pro rata* for payment of specialty debts, where estates devised to heir-at-law, and to other parties, Ch. 177

— not allowed to defend a suit *in forma pauperis*, Ch. 232

— Charge of 4*l.* per cent. only on balance due from estate of executrix, from the time of her death, to the payment of balance into court, where she was entitled to the income of the residuary estate for life, and omitted to invest a portion of the testator's assets, on the supposition that she was absolutely entitled to it, Ch. 260

— As to application of specific legacies in payment of debts, Ch. 364

— As to payment of assets into court, on obtaining injunction to restrain creditor from suing at law, Ch. 383

— Order on executrix of executor to pay money into court, where executor has improperly invested money in promissory note, and the executrix, after his death, has renewed it to herself, Ex. Eq. 93

Family Arrangement—Where cancelled for fraud, Ch. 84

Fine—No operation on tithes, whilst they remain spiritual, Ex. Eq. 57

Foreign Law. See Contract.

Fraud—Where agreement ordered to be delivered up for, Ch. 84

— Setting aside sales of reversionary interest after twenty years, on bill by eldest son of reversioner, Ch. 284

— Necessity of stating particular facts on which a charge of fraud is grounded, Ex. Eq. 24

Grammar School. See Charity.

Guarantee—Relief in equity of guarantor under composition deed, from guarantee given to bankers, on their agreeing to advance a sum to debtor to pay composition, and furnish capital in his trade, by reason of misrepresentations of bankers, and agreement between them and the debtor that they should deduct a sum to pay their own debt. Where other guarantors not necessary parties, Ex. Eq. 27

Habeas Corpus—As to non-interference of Court of Chancery with decrees of Ecclesiastical Courts, where matters within their jurisdiction, Ch. 108

Heir-at-Law—Where a necessary party to suit for administering assets, Ch. 190

— Practice as to not inquiring as to customary heir, on decree or order to inquire who is the heir-at-law, Ch. 315

— Right of, to rents of real estate contracted to be sold by intestate, Ch. 362

— See *Devise*.

Impertinence—Plaintiff not allowed to file exceptions to part of report, finding portion of answer not impertinent, without special leave, where part reported by Master impertinent and the other not, and plaintiff takes the usual proceedings to expunge the part found impertinent, Ch. 79

— Exception to matter contained in schedule annexed to answer of trustees to bill by infants for account of lands, &c., setting forth names, acreage, boundaries, &c. of all the lands. 11th Order of 1828 not applicable; but *Norway v. Rowe* an authority, notwithstanding that order, Ch. 282

Imprisonment for Debt Act. See *Arrest*.

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— Residuary legatees not entitled to sum of 2,700*l.* where testator directs trustees to invest 3,000*l.* upon trust for his daughter for life, and after her death upon such trusts as she shall appoint, giving share of his residuary estate to her absolutely, and she by will, reciting that trustees have purchased stock with the 3,000*l.* and her share of the residue, directs the whole of the stock to be transferred to trustees, on trust to pay 2,700*l.*, part thereof, to her mother, and to stand possessed of the residue of the trust funds, after satisfying the legacies, upon trust for the benefit of other parties, and her mother dies during her lifetime, Ch. 81

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— Portion of income given for maintenance of children unapplied by trustees, where children die intestate, held to belong to the representative of survivor, and not to residuary legatee or testator, Ch. 89

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— Portion advanced by parent or party *in loco parentis*, of less amount than provision made by will, an ademption only *pro tanto*, Ch. 153

— Trusts of term created by settlor for raising portions for children, providing that any sum or sums of money, which the settlor shall in his lifetime, or by his will, settle or give upon or to the children entitled to such portions, shall be taken in satisfaction thereof, unless the settlor by writing declare the contrary. Settlor devises estate charged with the portions, subject to that charge, upon trust for sale, and out of the proceeds to pay 2,000*l.* each to two of the children, entitled to portions under the trusts of the term. *Prima facie* the legacies must be taken to be in satisfaction of the portions, and it lies upon the children claiming both, to shew a declaration by the settlor to the contrary. Devise of the estate, subject to the charge of the amount of the fund raised for portions, does not entitle the children to the portions in addition to the legacies, in the absence of any express declaration to that effect, Ch. 184

— Gift of a legacy to A, of a legacy to A's sister, M, and a legacy to their mother; and then a bequest to the three aunts of A and his sister M of 100*l.* each. The aunts only, and not the sister, entitled to the legacies of 100*l.*, Ch. 200

— Construction of bequest of residue to a company, to apply the interest of one moiety to the redemption of British slaves in Turkey and Barbary, one-fourth to charity schools in the city and suburbs of London established according to the doctrines of the Church of England, and in consideration of the care and pains taken by the company, the remaining one-fourth to be applied by the company towards necessitated freemen, their wives and children, with reference to the way in which the moiety is to be applied on failure of direct objects. The Mico charity, for the redemption of poor slaves in the British colonies, not one to which the moiety can be applied on the doctrine of *cy-pres*; but the fund applicable in support of charity schools in England and Wales, where the education is according to the Church of England, Ch. 201

— by A to C. C, a married woman, of 1,000*l.* to be transferred to her in her own name, for her separate use, and the principal to remain in trust of A's trust-

tees till C. C.'s youngest child shall attain twenty-one, when the principal is to be her own. A's executors transfer 1,000*l.* into the name of C. C., and she and her husband sell the stock before their youngest child attains twenty-one. C. C., after her husband's death, files a bill to have this sum invested by A's executors. The executors decreed to pay the money into court: but C. C. held to have a valid disposition of the dividends which should accrue due before her youngest child attained twenty-one, and consequently not to be entitled to any of such dividends, Ch. 212

Legacy—Absolute interest taken by testator's daughter in 1,950*l.* and in remainder of 5,000*l.*, where testator bequeaths residue of personal estate to trustees, upon trust, to raise therefrom 5,000*l.* for his daughter, and to place out her legacy at interest, and pay the dividends to her during her life, for her separate use; and, after her decease, the legacy so given to her children: and authorizes her, if she marries, to appoint the interest to her husband for his life, if he survive her; with authority to raise the legacy out of real estates, if personal insufficient; and by a deed of appointment, of even date with the will, the testator and his wife charge other real estates with 1,950*l.* in favour of the daughter, upon the same trusts as are expressed in the will, with an ultimate gift over; in default of children, to the daughter absolutely; and by a codicil, also of the same date, after reciting the appointment, the testator directs that this 1,950*l.* shall be taken as part of the legacy given to her by the will, and charges the residue on certain real estate; the testator's personal estate being exhausted by the payment of his debts; and the daughter dying unmarried, Ch. 216

— Proceeds of real and personal estate to form one common fund, and bequest of 100*l.* and sixth part of share in residue to legatee who dies in testator's lifetime. Lapsed legacy of 100*l.* falls into residue, but share of residue goes to testator's heir-at-law and next-of-kin, in proportion to amount contributed to residue by real and personal estate respectively, Ch. 234

— Residue to devolve to M. S. and the children of J. S., to be equally divided: M. S. and the children of J. S. take in equal shares *per capita*, Ch. 235

— to A, in case of her death to devolve to her children, with gift over in the event of their being dead at her decease, to be paid to children living at her decease, children dying in A's lifetime taking no interest, Ch. 304

— Residuary personal estate to be divided by trustees into three shares, out of one 500*l.* to be paid to a son, interest of remainder to him for life, and after his death principal to be divided amongst his children: if son dies in lifetime of testatrix the 500*l.* lapses to the next-of-kin, Ch. 327

— Construction of bequest of annuity to A for ever, where A survives testator and dies intestate, to be most beneficial to legatee, and declaration that it is given to his executors, administrators and assigns absolutely, Ch. 339

— 2,000*l.* to daughter, with direction that she shall let it remain in the hands of executors (testator's three sons,) until she shall marry; and payment of it charged upon real estate devised to the three sons. Three sons die, having devised their property to parties who become bankrupts. Legacy payable out of the real estate, though the legatee was never married, Ch. 340

— Funds brought into court, directed by testator to be invested in lands to be settled upon A in tail, subject to the payment of an annuity. Order made upon petition by A, that a sufficient sum to answer the annuity should be set apart, and that the residue

of the fund should be paid to him. Upon the death of the annuitant, A held to have elected to take the whole fund as money, thereby barring the entail, and A's executors are entitled to the sum set apart for the annuity, Ch. 341

Legacy—Annuity of 600*l.* per annum to B for life, but not to be liable to the controul of any husband, to be paid quarterly, from time to time, on her receipt only, &c., and after her death, the said annuity to be equally divided between six persons named in the will, or the survivors or survivor. Five of such six who survive B take an annuity of 600*l.* as tenants in common, and not as joint tenants, and are not entitled on A's death to receive a sum of money sufficient to raise the annuity of 600*l.*, Ch. 342

— Bequest to executors of East India stock, upon trust, to accumulate the interest till D. attains twenty-five, and then to transfer the stock, with the accumulations, to D. Legacy vested, and D, having attained twenty-one, is entitled to call for a transfer of the fund, Ch. 354

— Gift of residue unto all and every the children, sons and daughters of the testator's daughter, in equal shares and proportions, as and when they shall respectively attain their respective ages of twenty-two years, takes effect as a gift to the children living at the death of the testator, but is void as to after-born issue, Ch. 363

— Specific legacies to be wholly applied in payment of debts, where the rest of the personal estate is insufficient, after the application of real estate descended, but before the application of any part of the devised real estates. Testator gives to his son all his furniture and articles of domestic use and ornament; and to his widow the use of all his books: books pass to the son, under the first gift; and the widow takes a life interest in them under the second, Ch. 364

— Rents of estates to be divided equally between four persons (one S. B. the widow of W. B.) until all the children of W. B. should attain twenty-one. Estates then to be sold, and the produce divided equally between the three former legatees, and the children of W. B. who should attain twenty-one. Residue of estate, to be equally divided between the same three persons and the children of W. B. who should attain twenty-one: Children of W. B. attaining twenty-one, entitled to one-fourth share of the residue, to be equally divided among themselves, Ch. 371

— Bequest of share of residuary estate to be accumulated for the benefit of all the children of two nephews, in equal shares, to be vested interests, in sons at twenty-five, and in daughters at twenty-five or marriage, too remote, and consequently void, Ch. 372

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Legacy Duty—Bequest of residue of personal estate, upon trust for daughter, J. A. P. for her life; and after her decease, upon trust, for such persons (except certain parties named in the will) as J. A. P. should appoint by will; and in default of appointment, upon trust for other parties. J. A. P., by her will, appointed the trust fund in exercise of this power:—Held, that this was a general and absolute power within the meaning of the 36 Geo. 3. c. 52; and, first, that a legacy duty of 1*l.* per cent. was payable in respect of the testator's residuary estate, bequeathed in the manner before mentioned; secondly, that no probate duty was payable upon the probate of J. A. P.'s will, in respect of her father's residuary

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— Objection that defendants are not answerable to creditors, but only to personal representatives, and that no such representatives are parties, an objection for want of parties, and not for want of equity, Ch. 14

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— Misjoinder of plaintiff as legatee and as next friend of infant children, where renewable leaseholds given to W. and wife for life, in trust to renew, and out of rents and profits to pay fines, &c., and as to residue for wife for life, remainder to children of marriage, residuary estate being charged with annuity to plaintiff; the bill praying payment of arrears, and investment out of residue to answer growing payments of annuity, and that trusts of the leaseholds might be carried into execution, and trustees decreed to renew, Ex. Eq. 9

— One plaintiff having no interest on the record, not a valid objection at the hearing, if the Court can make a just and complete decree: but bill may be dismissed at the hearing, if interests of co-plaintiffs conflicting, Ex. Eq. 17

— Feme covert stated to be a partner, not a necessary party to bill respecting the partnership, unless suggested that she had the authority of her husband, Ex. Eq. 24

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— How far doctrine in *Loscombe v. Russell*, 4 Sim. 11, "that Court will stand neuter on occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible the partnership should continue," is consistent with principle in *Hichens v. Congreve*, *Taylor v. Salmon*, and other cases, Ch. 139

— As to ordering one partner to produce or set forth the contents of partnership books or accounts, Ch. 169

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— As to partnership in Life Assurance Society, so as to render actual notice of assignment of life policy unnecessary for the purpose of completing the title of the assignee, Ch. 307

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— Motion for liberty to try question at law, not too late, though suit in equity to restrain infringement of patent at issue, if publication has not passed, Ch. 219

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— Allowance of demurrer to information and bill of Attorney General on behalf of a charity, at the relation of persons also plaintiffs, as they did not state any title to individual relief, though title for relief shewn so far as it was sought for the benefit of the charity. Leave to amend generally, but not to remove any of the plaintiffs from continuing as relators, Ch. 111

— Mode of setting forth accounts by representatives, and general description of documents in schedule to answer, Ch. 145

— Bill for administration of real and personal estates of deceased partners, sustainable by joint creditor, in one suit against their representatives and the surviving partners, Ch. 190

— Defendant at liberty to put in a new defence by way of plea, where plea overruled, leave given to plaintiff to amend, and to defendant to plead *de novo*, and plaintiff has amended his bill. Plea to bill of discovery by heir-at-law, that plaintiff was not heir of party who died seized, denying intermediate steps of descent from ancestors to plaintiff, and that there was any descent or seisin in any of the parties, irregular, as comprising several distinct matters. Plea overruled by answer as to matters not material to displace plea. Whether negative plea can be put in to mere bill of discovery, Ch. 243

— Where plaintiff not entitled to answer to interrogatories not material to relief, Ch. 257

— Original bill, for administration of estate of A, stated that B and C were his executors, and had proved his will. Bill of revivor stated, that the statement in the original bill, that B had proved the will of A was inaccurate; that C alone had proved the will; that C was since dead, having appointed B his executor, and that B had proved C's will, and thereby become his personal representative, and also the legal personal representative of A, and had since possessed effects of both A and B. B, by plea to the bill of revivor, averred, that in the lifetime, and since the death of C, he (B) renounced probate of the will of A, and that he (B) had never inter-meddled with the estate or effects of A, and that no personal representative of A was a party:—Held, that the statement in the bill of revivor could not be taken as displacing the statement in the original bill; but the statement of the original bill could only be displaced by amendment; and that the objection was therefore properly taken by plea, and not by demurrer. That the plea averred only such matter as was necessary to negative the statement that B was the executor of A, and it was, therefore, not double, Ch. 351

— See Orders of 26 Aug. 1841, Ch. 411

— Bill by A, B, and C for an account, and to restrain actions at law against each for freight and average, not demurrable for multifariousness or want of equity, where plaintiffs, on their separate accounts, had put casks of oil on board defendant's vessel, and several of the casks having leaked during the voyage, the leakage oil was sold by defendant's agent, and the plaintiffs, being unable to ascertain how much of the oil belonged to each, agreed to apportion the proceeds, and required defendant to pay the money to them in such proportions, Ex. Eq. 11

— Insufficiency of assertion in bill that defendant claims some interest, without stating what; and how it affects the plaintiff, where defendant is not in pos-

session of property. Nothing admitted by demurrer but what is properly pleaded, Ex. Eq. 33

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Power—Appointment of estates to trustees to the use of A for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A in tail male, remainder to the use of the right heirs of B, for ever; and if the tenant for life or in tail in possession should become entitled to certain other estates, the former estates to go over as if such tenant for life was dead, or tenant in tail dead without issue. In the life of A, but before he had any son, the event happened on which the first estates were to go over:—Held, that the right heirs of B could not take the rents and profits of the estates during the life, or until the birth of a son of A, inasmuch as there was the prior estate of the trustees to preserve contingent remainders, who could not be construed to be trustees of such rents and profits for the benefit of the persons entitled under the remote limitation to the right heirs of B. That such intermediate rents and profits did not pass by the devise of "all the residue of 'my' real and personal estate," in the will of the person having the power of appointment; although in other parts of the will he had used the word "my," in reference to estates subject to the power. That though the legal estate was vested in the trustees by the appointment, yet in default of appointment of the beneficial interest, the Court would send a case for the decision of a court of law, on the question of the effect of the shifting clause in the prior limitations, upon the application of either of the parties claiming under such limitation, Ch. 38

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- made to R & Co., and by R & Co. to give J a bond to indemnify him; indemnity bond given to J, and surety bond executed by him but not by R: J not liable to the bankers. Promissory note given by J and R to banking firm, of which R is a member, as security for bill to be renewed advanced by that firm to D & Co., in which R is also a member. R retires from banking firm, who afterwards accept and pay another bill drawn by D & Co. The last bill considered a renewal of the first, and J liable on his promissory note, Ch. 395
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and parents of E. M. survive the child. The child and the parents of E. M. by virtue of the limitation to the next-of-kin of E. M. take the 10,000*l.* as joint tenants; and the parents of E. M. on surviving the child, are entitled to the whole 10,000*l.* as the survivors, Ch. 391

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